

DEVELOPING AND INITIAL TESTING OF PRO-POOR PRENUPTIAL AGREEMENTS AS A NEW LAND TENURE TOOL TO SECURE RIGHTS IN URBAN STATE-SUBSIDIZED HOUSING

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ABSTRACT

This research develops a pro-poor prenuptial agreement as an innovative land tenure tool to secure rights in urban subsidized housing. The model tested is confined to prenuptial agreements under the Marriage Act, but is relevant to other cohabitation or marital agreements that could be used to secure social tenure arising from intimate relationships. The model aims at securing the tenure of the entire household, in particular the more vulnerable members of the household. The research focuses on urban State-subsidized housing, with an emphasis on the Western Cape, South Africa. This housing is transferred to beneficiaries by registration of individual or co-ownership at the Deeds Registry, with the title deeds public documents. While prenuptial agreements are not usually regarded as a land tenure tool, the fact that they are also public documents registered at the Deeds Office makes them pertinent.

A limited dataset of recent academic writing is analysed to identify the social context of household conflict and tenure insecurity, and existing legal template clauses assessed. The prenuptial template design is predicated on current tenure approaches that regard informal practices as equally relevant for the poor's tenure security as the formal law. The template uses various strategies to manage tenure insecurity arising from the death of an owner, disputes, or threatened eviction of dependents. It also aims to ensure that diverse normative beliefs are respected, particularly African normative systems. A personal servitude is used to secure housing tenure as a real right burdening the land, making this a very secure right. In addition the template includes a succession agreement and dispute resolution mechanisms.

The template model is tested on clients simulated by re-storying the facts of two seminal Constitutional Court cases and a recent case study of another researcher. Focus groups are held with housing beneficiaries and interviews with housing officials, as a preliminary test of the private and public reception of such agreements. The need for legal aid is discussed. The research makes clear that cohabitation and marital agreements can be used to secure overlapping land rights that the ownership paradigm does not currently protect.

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I wish to express my deep appreciation to Jenny Whittal, my promoter. I originally approached her to ask if she knew anyone undertaking case study research that could twin with my legal research. She surprised me by suggesting I register for an M Phil in the Faculty of Engineering and the Built Environment. This proved decisive for the thesis, liberating me to focus on informal as well as legal realities, and to place a greater emphasis on social tenure. Jenny has been a diligent and incisive supervisor, with a gift for releasing a mature candidate to research in her own way.

There are others I also wish to thank: the housing beneficiaries who graciously and gratuitously gave up their time for the focus groups; Gerhard Lubbe, who assisted with shaping my original LLM thesis proposal (giving me the confidence to take it forward); Amanda Barratt (the second promoter for the M Phil); Ben Cousins (whose advice to include focus groups greatly enhanced the thesis); Werner Zybrands and Melanie Tenner Pienaar (both of whose support for my work has been constant) and all the municipal managers and housing officials interviewed from the Western Cape Department of Human Settlements, Mossel Bay Municipality, City of Cape Town, Drakenstein Municipality and Bergrivier Municipality. Many other people allowed me to pick their brains on various issues, including Hanri Mostert, Rosalie Kingwill, Paul Whelan, Marius de Waal, Luanda Hawthorne, Mike Barry, Tjakie Naude, Jacques Joubert, Graham Giles, Jacques Jacobs and Fatima Osmon. The UCT support staff were also most helpful, namely Alta du Plooy and the three librarians Dianne Steele, Laureen Rushby and Anthea Arendse, as well as the other Geomatics post-graduate students who shared their insights. Any faults are of course my own.

Lastly, my thanks to God, who gave me such wonderful parents. My mother helped me to survive the killing pace I set myself for completion, by insisting on many windows of wine and laughter. Her passion for teaching art to the type of children this thesis seeks to protect is a constant inspiration to me. My father was a lawyer, with his eccentricity making him the only fully freethinking person I have had the privilege to know. He passed away as I was driving back from one of the thesis focus groups. He understood the meaning of family, and I trust on his last morning I was where he would wish me to be.

DEDICATED TO:

My mother Donna and my father Roy

and

My children Katherine, Ashleigh and Ewan: May the “rights, restrictions and responsibilities” that give meaning to your relationships always be a source of joy.

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CHAPTER 1

INTRODUCTION

Note to the reader/viewer

This art image has been removed pending copyright approval.

To view the image on the internet please use:

The artist's name: "Ricky Dyaloyi"

and

The title of the painting: "Enjoy Responsibly"

ENJOY RESPONSIBLY

Ricky Dyaloyi

Born Cape Town 1974

1 INTRODUCTION

It is a truth universally acknowledged, that a single man in possession of a good fortune must be in want of a wife.

*Pride and Prejudice*¹

1.1 GENERAL INTRODUCTION

Ricky Dyaloyi's painting on the front page of this thesis is used to illustrate the dual aim of the thesis, namely to secure housing tenure for individuals, while promoting a view of public policy that demands that the gift of subsidized housing is something beneficiaries must "enjoy responsibly". The thesis will analyse the potential of pro-poor prenuptial agreements to act as a land tenure tool to secure housing rights in urban State-subsidized housing. It will confine itself to prenuptial agreements for poor South African couples marrying under the Marriage Act.² The default matrimonial system for all South African marriages is that of community of property and profit and loss. All the marriage statutes make provision for couples to exclude this default system with a prenuptial agreement.

All South African marriage systems give rise to a reciprocal duty of spousal support, *pro rata* according to each spouse's means. There are also duties of support that arise separately from marriage, particularly towards children and parents. Duties of support arise *ex lege* and cannot be removed by prenuptial contract, although prenuptial contracts can strengthen the practical ability to enforce these rights and duties by the manner in which rights to spousal assets are determined. While limited to prenuptial agreements, the outcome of the thesis is relevant to all private domestic agreements that are capable of enhancing duties of support (and accordingly able to secure housing tenure) both in the rural and the urban setting.

¹ J Austen 1775-1817 *Pride and Prejudice* (2008) 1.

² Act 25 of 1961.

UN-Habitat defines tenure as based on “relationships between people and land directly, and between individuals and groups of people in their dealings with land”.³ It is often stated that in Africa the traditional normative view is to see people as belonging to land, rather than land belonging to people.⁴ This thesis will focus on intimate relationships of belonging pertaining to individuals and their dependents, in their dealing with subsidized housing. As Heaton notes: “Family groups share the following features: they are intimate and interdependent; they are relatively stable over time; and they are set off from other groups by boundaries related to the family group, such that one family is separate from another in a variety of ways”.⁵ The particular family group that is considered is the household group constituted as a result of an application for a housing subsidy in South Africa. The “boundaries” of such groups are largely determined by the 2009 National Housing Code definition of dependents, which is significantly different to the definition of legal dependents.⁶ The Code’s definition is pro-poor, being based not primarily on degrees of family consanguinity and marriage, but on need in the form of “financial dependence”.⁷

A “poor” person is defined for the purposes of this thesis as any person who is a member of a household that qualifies for a housing subsidy. UN-Habitat defines land tools as “pro-poor” if they aim to reduce poverty, meaning that they take “the situation and needs of the poor into account” and give them “a voice in decisions”.⁸ For the purposes of this thesis, “pro-poor” is seen as also including the constitutional obligation to respect, protect, promote and fulfil the dignity, equality and freedom of the poor as a class.⁹ The thesis aims to test the potential of prenuptial agreements to protect marginalized household members to access housing and protect housing tenure rights within this frame.

Prenuptial agreements are usually used as a tool to protect the property of spouses

³ UN-Habitat *Monitoring Security of Tenure in Cities: People, Land and Policies* (2011) 5.

⁴ See ch 3.

⁵ TB Heaton “Social and Economic Context of Families and Households in South Africa” in AY Amoateng & TB Heaton (eds) *Families and Households in Post Apartheid South Africa: Socio-Demographic Perspectives* (2007) 14-15.

⁶ See ch 4.

⁷ “Consanguinity” means people descended from the same ancestor.

⁸ UN-Habitat “The Global Land Tool Network” in UN-Habitat GLTN *Handling Land: Innovative Tools for Land Governance and Secure Tenure* (2012) 7 8.

⁹ Ss 7(1) and 7(2) Constitution of the Republic of South Africa, 1996.

against third parties and to exclude assets from the default matrimonial property system. An overview of prevailing approaches to marital agreements can be found in a 2012 publication *Marital Agreements and Private Autonomy in Comparative Perspective*, which draws a comparison between fifteen different countries.¹⁰ The use of prenuptial agreements is shown still to be fairly rare, with the default system of the country much more important. The countries chosen for the book are all in the first world, meaning the book speaks into a more affluent environment. The editor, Scherpe, sees the Netherlands as particularly relevant, due to it being the only country in Europe with the default community of property regime. This leads him to presume it has the highest proportion of marital agreements, meaning a “significant body of jurisprudence and academic writing” on the subject could be expected as a valuable source for study.¹¹ The authors of the chapter on the Netherlands surprisingly state that the Netherlands is “unique in the world” in providing for a default universal community of property on marriage in terms of which everything falls into the community estate.¹² The default system in South African is also that of community of property and of profit and loss. The same default system is applicable in other jurisdictions that use the Roman-Dutch common law such as Botswana, Namibia, Zimbabwe, Lesotho and Swaziland. If the Netherlands is deemed to have become the most relevant country to research on marriage contracts due to its default community of property system, this makes South Africa equally relevant, particularly in Southern Africa and the developing world.

In South Africa a default accrual prenuptial contract is provided for by statute, for couples that choose to exclude community of property. While this is the most common prenuptial form, couples are free to contract out of it. Recent academic writing suggests that the courts’ power to overrule contracts on divorce if they are unfair is too limited. The focus in family law is therefore more on the underlying need to change the law relating to cohabitation and divorce rights in general, rather than the need for further change to the nature of the marital contracts themselves.¹³

The common view of the utility of prenuptial agreements can be found in the closing

¹⁰ JM Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (2012).

¹¹ JM Scherpe “Introduction” in *Marital Agreements* 1 7.

¹² K Boele-Woelki & B Braat “The Netherlands” in *Marital Agreements* 229 248.

¹³ See ch 4.

chapter of *Marital Agreements*.¹⁴ The reasons given for the use of a prenuptial agreement reflect the typical conventional understanding of its function, namely: The desire to insure against the risk of marital breakdown; to “ring-fence” property owned before marriage; protecting a fair share of property for children from a previous marriage; tax efficiency; protecting a spouse from creditors; and protecting “of course, generally speaking one’s own financial advantage”.¹⁵ This being the case, it is unsurprising that the researcher has been unable to find any reference to research on marital agreements being used for pro-poor purposes, or on the contract’s use primarily as a means to benefit third parties. This thesis aims to take an entirely different view of the role of a prenuptial agreement. Priority will be given to individuals that have passed a means test confirming poverty (leading to an inability to acquire land assets).

In the foreword to *Marital Agreements*, the Rt Hon Lord Wilson of Culworth (*sic*) suggests that marital agreements “have yet to achieve the optimum fine balance between two of the central goals of any democratic society – to promote autonomy and to protect the vulnerable”.¹⁶ This thesis will take a relational approach to achieving these societal goals. As Laufer-Ukeles explains in her research on the needs of children and caregivers: “Relational rights do not protect two individuals together. Rather, the rights attach to the individuals, but the duty to the individual comes in the form of support for the relationship”.¹⁷ As Nedelsky points out, the State should foster conditions where people (as family members, friends, members of a community and citizens) can “form caring, responsible and intimate relationships with each other”.¹⁸ The thesis will aim to find an optimum balance between curtailing the *individual* autonomy of conventional land right holders who obtained the benefit from the State and strengthening third party dependents to the point that they can no longer be defined as vulnerable. To this end personal housing rights are prioritized above ownership and housing need is prioritized above the right to

¹⁴ JM Scherpe “Marital Agreements and Private Autonomy in Comparative Perspective” in *Marital Agreements* 443.

¹⁵ 445-446.

¹⁶ Lord Wilson of Culworth “Foreword” in *Marital Agreements* vii (researcher’s italics).

¹⁷ P Laufer-Ukeles “The Case Against Separating the Care from the Caregiver: Reuniting Caregivers’ Rights and Children’s Rights” (2015) 15 *Nevada Law Journal* 236 283.

¹⁸ J Nedelsky “Property in Potential Life: A Relational Approach to Choosing Legal Categories” (1993) 6 *Canada Journal of Law and Jurisprudence* 343 355. For a further discussion of relational autonomy, see J Nedelsky *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (2011).

alienate, to evict or to freely determine succession. Four legal mechanisms are used, each of which are rarely applied for prenuptial agreements in South Africa. They are agreements to entrench benefits for third parties, succession agreements, agreements creating servitudes of use and for alternative dispute resolution.

In keeping with current tenure thinking, as much cognizance is taken of informal practices amongst the poor as of the formal law.¹⁹ The definitions for “formal”, “informal”, “rights”, “interests” and “tenure” are legion. In line with the broader pragmatic aims of this thesis, simple definitions accessible to lay readers will be used. “Formal” means any practice or interest that is, or can be, recognized and entrenched by recourse to existing legal processes and rules. “Informal” means any practice or interest that either *is not, or cannot be*, recognized and entrenched by recourse to existing legal processes and rules. Inter-racial and gay marriages were not recognized before the new legal dispensation and would accordingly have been described as informal according to this definition. Similarly, under current law a prenuptial agreement for a marriage entered into under the common law and the Marriage Act cannot entrench (for example) the practice of marrying a second spouse during the existence of a current marriage.

“Informal cohabitation” in this thesis means cohabitation without a recorded cohabitation agreement or marriage certificate. A “right” is used in the “concrete legal sense” as “a power, privilege, demand or claim possessed by a particular person by virtue of law”.²⁰ In other words a popular legal definition of “right” will be used, as opposed to the broader social tenure usage whereby a “right” is contextually conceived according to the perception of the holders and their communities, which could be based on values, culture, social, custom or legal systems.²¹ Group rights are also used in this concrete sense. “Interest” means a power, privilege, demand or claim possessed by a particular person, or group of persons, *not necessarily* by virtue of law. “Tenure” means “a right, term or mode of holding or occupying something

¹⁹ See ch 5.

²⁰ *Legal Dictionary: The Free Dictionary* <<http://legal-dictionary.thefreedictionary.com/right>> (accessed 29-05-2015). The *Free Dictionary* is used based on a commitment to plain language.

²¹ Social tenure is discussed further in ch 5. See also P Saers, C Lemmen, D Antonio, C Augustinus, M Molendijk & K De Zeeuw “Social Tenure Domain Model - A Strategy Towards Country Implementation” in *Linking Land Tenure and Use for Shared Prosperity World Bank Conference on Land and Poverty 23-27 March 2015, Washington DC* (2015).

of value for a period of time”.²² “Prenuptial” and “antenuptial” both have the same meaning, namely “before marriage.” The South African statutes use the term “antenuptial.” This thesis will use the term “prenuptial” in all instances other than when a statute is quoted. Reconstruction and Development Programme houses (“RDP houses”) will be used to refer to all State subsidized housing. This is not technically the correct phrase in many cases, but is the phrase used colloquially.

1.2 PROBLEM STATEMENT

1.2.1 HOUSEHOLDS AFFECTED

It is estimated that by 2050 70% of the world population will live in cities, with the housing challenges immense.²³ In a 2013 media briefing, the outstanding provincial subsidized housing demand for the Western Cape alone was estimated as 500 000.²⁴ State subsidized housing aims to address these housing challenges. The 2012 *White Paper on Families* indicates that over 40% of South African families are headed by a single parent. It notes that absent (but living) fathers constituted 47.4% of households in 2010. Nevertheless it adds that from 1996 to 2001 the number of cohabiting South Africans doubled from 1.2 million to almost 2.4 million.²⁵ In 2011, 3 165 497 South Africans lived together “like husband and wife” even though not married to each other.²⁶ Given these figures this thesis is likely to be of relevance to a substantial number of single people contemplating a committed relationship.

A “household” is defined (for the purposes of this thesis) as the applicants and their financial dependents that are identified in the State subsidy process together with subsequent dependents after the housing and land is awarded. A number of different types of subsidies are awarded, all of which include a requirement to comply with a

²² *Legal Dictionary: The Free Dictionary* <<http://legal-dictionary.thefreedictionary.com/tenure>> (accessed 20-06-2015). See also n3.

²³ C Augustinus “Social Tenure Domain Model: What It Can Mean for the Land Industry and for the Poor” *Proceedings of the XXIV FIG International Congress, 11-16 April 2010, Sydney, Australia* (2010) 4.

²⁴ Western Cape Department of Human Settlements *Media Briefing: Housing Demand Data Improvement Programme (HDDIP)* (06-08-2013) (2013) 5.

²⁵ Department of Social Development *White Paper on Families in South Africa 2012* (2012) 18-19 and 24.

²⁶ B Smith “The Dissolution of a Life or Domestic Partnership” in J Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) 389 392.

means test. The means test threshold at time of writing for the individual housing subsidy is a combined gross household income of less than R3 500 per month.²⁷ The finance linked individual subsidy threshold is a household income of between R3 500 and R15 000.²⁸ Many researchers would not include this range in poverty studies.²⁹ These households are however also included in the definition of a poor person, given that the thesis focuses on State-subsidized housing.

1.2.2 THE URBAN LAND CONSTRUCT AND ITS EFFECT ON TENURE

Subsidized housing is transferred by individual titles of ownership. High volumes of men had the good fortune of the ownership of State funded houses being registered in their name alone in the past.³⁰ This conferred on them the right of possession and unobstructed disposal over the land. Women in cohabiting relationships are disadvantaged if these men are unwilling to marry them.³¹ Reasons for non-committal may include that they do not wish to lose full decision-making powers and ownership of the property. On the other hand, current housing policy to redress past gender imbalances results in more women obtaining sole title. Such women may equally be unwilling to marry their partners due to the property consequences. In terms of the law children of unmarried parents have the same rights against their fathers (and mothers) as children whose parents are married to each other. In practice it might be more difficult for children to claim benefits from an unmarried father. A failure to marry and have a marriage certificate (proving the right to support) can prejudice the ability of potential spouses and children to claim for housing, medical aid, pension, maintenance and intestate succession benefits. In recent years, where couples are married or cohabiting at the time of applying for a subsidy, the land has

²⁷ Western Cape Department of Human Settlements *Individual Housing Subsidy Programme* unpublished information page available at the Western Cape Department of Human Settlements help desk on 21 May 2015.

²⁸ Western Cape Department of Human Settlements *Finance Linked Individual Housing Subsidy Programme* unpublished information page available at the Western Cape Department of Human Settlements help desk on 21 May 2015.

²⁹ For a discussion of the difficulties of conceptualizing poverty see Statistics South Africa *Poverty Profile of South Africa: Application of the Poverty Lines on the LCS 2008/2009* (2012) 54.

³⁰ W de Vos *The Law of Marriage* (197?) 46 notes the registration practices in the past generally made it “impossible to see from the title deed of the property whether the property is owned by one person or jointly by spouses joined in community of property.”

³¹ See *Volks NO vs Robinson* 2005 5 BCLR 446 (CC) para 65 on the plight of women in cohabiting relationships.

been registered as co-ownership,³² but heterosexual cohabiting partners do not have automatic rights of intestate succession from each other.³³

In all instances the housing tenure security of dependents is prejudiced by the absence of some form of group registration that includes rights for the dependent members of the household. This undermines the State's original intention to provide housing protection for the main beneficiary and all dependents, not for a single beneficiary or the couple alone. Dependency is based on need for housing subsidy purposes. It can be an informal arrangement with dependents not necessarily construed according to usual definitions of legal dependency. Accordingly, the individual titling process, intended to confer the high level of protection offered by a real right, in practice often denies dependents formal rights, other than a claim for support enforceable by litigation through the courts.

Monogamous marriage without a prenuptial contract results in the ownership of an undivided half share in land owned by the other spouse. It is a valid legal cause for the formal transfer of ownership of a half share of land and any buildings on the land. Ownership rights vest on date of marriage, before registration at the Deeds Office. This means that the consequences of formalization of land rights and formalization of relationship status hang together. Marriage formalisation is a free procedure.³⁴ It is therefore also a free way to dispose of the right to land ownership in a legally enforceable manner. This makes it highly relevant to the poor.

Household problems in urban State-subsidized housing often reflect two competing views of land tenure. One does not see land tenure as best secured by private ownership, but rather as a group's customary right to the use of the land, buttressed by the right to limit the disposal of land in a manner that threatens such rights. The other sees land tenure as best secured by means of private individual (or co-) ownership. The use of informal tenure practices varies with South African State-

³² See ch 5.

³³ See ch 4.

³⁴ The marriage statutes make provision for charges in some cases, but there are many organizations that would solemnize marriages for the poor for free.

subsidized houses, but was noted by Barry and Roux in a 2015 study as pervasive in some areas.³⁵

Statutory changes to ownership registration may be considered in the long term for urban subsidized housing. However, existing sole title rights within a paradigm of group rights are inevitable in urban areas for the foreseeable future. The fact that ownership tenure can be constituted by marriage prior to registration at the Deeds Office means that marriage should be seen as a very significant category of tenure rights distinct from other forms of ownership.

1.2.3 THE EFFECT OF DIFFERING NORMATIVE BELIEFS³⁶

Many couples holding a hybrid system of personal marital norms marry under the civil system. The allocation of land rights in African customary systems is strongly influenced by the broader interests of relatives. When applied normatively, African customary systems include dependency rights not only for the vertical nuclear family, but also horizontally for a much wider kinship group. In this scheme of things land is capable of re-allocation according to need. This African approach to family is deeply embedded and often impacts on urban housing conflicts, irrespective of the presence of a civil marriage. Informal solutions manifest themselves particularly with beneficiaries of a customary background living in urban areas.

New equality policies for housing are resulting in women increasingly being given direct title to land, based on a recognition of the disadvantage they often suffer under due to lower earning powers and often being the sole care-givers for children.³⁷ Ownership rights give poor women (and should they consent, those members of their family they wish to assist them) a much stronger hand in future marital negotiations. Prenuptial agreements manage the outcome of death, divorce and loss of property to

³⁵ M Barry & LM Roux “Land Narratives and Land Registration in State-Subsidised Housing in South Africa” *Proceedings of the FIG Working Week, 17-21 May 2015, Sofia, Bulgaria* Paper 7852 (2015) <http://www.fig.net/resources/proceedings/fig_proceedings/fig2015/papers/ts06b/TS06B_barry_et_al_7852.pdf> (accessed 10-07-2015); LM Roux *Land Registration Use: Sales in a State-Subsidised Housing Estate in South Africa* (2013) Phd thesis Calgary Alberta (2013) 220-230.

³⁶ See ch 3 and B Cousins “Women’s Land Rights and Social Change in Rural South Africa: The Case of Msinga, Kwazulu-Natal” (2013) in A Claassens & D Smythe (eds) *Marriage Land and Custom: Essays on Law and Social Change in South Africa* 73-99.

³⁷ See ch 5.

debtors, and they can be structured according to a couple's own normative views. Private views of rights to matrimonial property are critical to urban land tenure reform. Marital contracts are able to address very real social issues underlying the marginalization of dependents in urban subsidized housing.

1.2.4 THE ABSENCE OF APPROPRIATE LEGAL AID

The poor's broader lack of access to legal education, advice and remedies is a widely recognized problem. Housing beneficiary couples are often not able to register transfer of a half or whole share of their subsidized property if their relationship breaks down. The 2015 cost of registering transfer of ownership of a house valued below R100 000 according to the Law Society guidelines is R3 950 before the additional costs for rates certificates, deeds office fees and the like, with the disbursements taking it up to approximately R5 320.³⁸ Intervening transfers due to deceased succession are often not registered due to the high cost of registration and other social factors, such that the number of land disputes grows exponentially. The conveyancing cost for subsequent transfers of previously subsidized houses is beyond the reach of most poor titleholders. As Holness notes, it is apparent that "access to a lawyer in civil matters is for well-off South Africans only".³⁹

The existing procedures for disposal of urban subsidized housing are defective from the poor's perspective and hamstrung by this lack of access to legal advice and assistance. As a result informal practices have developed by way of a response in respect of the sale, inheritance and donation of land. This sometimes results in a loss of housing for the original beneficiaries and their dependents. Some of these practices reflect Ubuntu values deserving legal protection, but function less than optimally precisely because of their informality.

³⁸ GhostDigest "Conveyancing Tables" *GhostDigest Conveyancing News and Views* 29-05-2015 <<http://www.ghostdigest.co.za/articles/conveyancing-tables-may-2015/54786>> (accessed 29-05-2015); Fairbridges Attorneys *Conveyancing Cost Calculator* 2015 <<http://www.fairbridges.co.za>> (accessed 29-05-2015).

³⁹ D Holness "Recent Developments in the Provision of Pro Bono Legal Services by Attorneys in South Africa" (2013) 16 *PER* 129 129-130.

On the litigation level, many conflicts in poor households begin when the relationship of an intimately involved couple breaks down. If this occurs before the first title deed is issued, resolution of the land repercussions of this dispute are dealt with as part of a housing department's administrative function. This creates a very onerous responsibility for government. The records of the details of housing beneficiary's dependents are likely to be incomplete, particularly in the case of older properties. Informal remedies to cure urban land conflicts can then be triggered by inaccessible records and a vacuum of legal solutions. A formal marital agreement confirming rights and duties to the subsidized property would considerably ease this situation, both for officials and for households. At present, however, there is no legal aid for cohabitation and prenuptial contracts. Even if a prenuptial contract can be afforded, contracts that differ from the statutory accrual contract are not available in standard form. There is no existing template that can be used to enhance the capacity of marriage as a protective legal structure for the poor.

1.2.5 THE ABSENCE OF FORMAL CONFLICT RESOLUTION PLATFORMS

Conflicts after the issue of the first title deed become the responsibility of the normal court system, with most ownership disputes falling outside the jurisdiction of the small claims courts. The absence of records that can be produced to prove a second beneficiary's claim makes reliance on State processes to found cohabiting partner and dependent claims difficult, if not impossible. This is so both from an administrative and a litigation perspective. Accordingly the impact on the State of conflicts due to a couple's failure to clarify their interpersonal obligations is immense. Even with a total overhaul of the subsidized housing titling system, the legal aid required to address these relationship conflicts is far too sophisticated and expensive for the State to achieve at scale. The difficulties for intestate succession in particular are recognized in a Western Cape Provincial Human Settlements circular, which notes the problem of displacement of children and cohabiting partners.⁴⁰

Neither the State nor the current available legal aid outlets have the capacity to correct the following causes of household conflict:

⁴⁰ Department of Human Settlements *Guidelines on the Protection of the Rights to Subsidised Properties of Descendants of Subsidy Beneficiaries* (2012) (Circular 07-05-2012) 16 and 18.

- lack of security of housing tenure for cohabiting spouses without a marriage certificate or cohabitation contract
- urban subsidized housing registration beneficiary policies that prioritized men
- deficiencies in State databases of details of cohabiting partners from the past
- effecting transfers if there are multiple intervening formal and informal sales
- curing the effect of unreported estates on the transfer of ownership, or
- offering access to courts for dependents to obtain the necessary redress and restitution for their right to housing security

Marital agreements could address a number of these concerns. Conflicts can be addressed in one of three ways: either by informal resolution; by expensive litigation after the fact; or proactively by contractual agreements. Marital agreements can clarify the intentions of parties up front to avoid future disputes and provide for affordable and accessible arbitration should a dispute be unavoidable.

1.3 RESEARCH OBJECTIVES

The aim of this thesis is to develop a pro-poor prenuptial agreement for couples in urban subsidized housing and undertake initial tests. It will test the potential of such agreements to secure housing and land tenure rights for vulnerable cohabiting men, women and their dependents. The divergence from the typical private ownership paradigm (that the project proposes to investigate) will focus on rules of private contract that show themselves fit for the purpose of regularising existing informal arrangements. Such terms can be freely agreed within households that know and understand their own private affairs intimately. This is something the State cannot – and should not – do, although the norms of good governance may require of the State to facilitate assistance in this regard. Diversifying the classical urban land tenure forms in this manner, by means of private contract, has not previously been explored.

A central objective is the design of a highly flexible agreement template that can speak into formal and informal perceptions of relational rights. The Recognition of Customary Marriages Act refers to marriage as something that is “negotiated”.⁴¹

⁴¹ Act 120 of 1998.

This reflects the customary understanding of marriage, which Claassens describes as being entered into by means of a “flexible range of consensual arrangements that had previously been negotiated within and between families”.⁴² Intrinsic to this is the recognition that agreements reached before marriage must anticipate future conflicts, including conflicts with third parties, particularly family conflicts over inheritance. It is short sighted to see agreements to benefit third parties as possible with customary marriages alone. The South African prenuptial contract (as provided for by the common law and by statute) can potentially offer the same “flexible range of consensual arrangements”. The only difference is that the rights entrenched are negotiated between the spouses alone. The model tested will look for flexible approaches capable of taking as much cognizance of dependent’s rights as spouse’s rights, as well as being predicated on a pro-poor ranking of dependent’s rights according to housing need.

A further objective will be to design the model in a manner consistent with contemporary land information system approaches. Formal land information systems assume that the most important information that needs to be recorded is people’s relationship to land, with people’s relationship to each other being secondary. It is regularly stated in current land tenure debates that in Africa it is traditional to see people as belonging to land rather than the Western norm of land belonging to people. There is a normative question prior to this for both worldviews, and that is the normative question that asks on what grounds people see themselves as belonging to each other. Belonging can be based on birth or a relational commitment, or by State imposition of compulsory legal support rights when relatives distance themselves from their obligations. At root, most systems of belonging can be traced back to the personal intentions that manifest themselves in intimate relationships. It is the terms and nature of this intention into which this thesis must speak. It may be that knowing which people belong to what land is of secondary importance. The primary need may actually be to record in a public database the intricate web of relationships that bind people and their dependents to each other. Tenure that cannot be secured against those with whom someone is in a relationship is unlikely to be secure against the world at large. The prenuptial

⁴² A Claassens & D Smythe “Marriage Land and Custom: What’s Law Got to Do with It?” (2013) in *Marriage, Land and Custom* 18.

agreement tested will therefore aim to be relevant to land information systems regarding personal relational information.

1.4 RESEARCH QUESTIONS

In order to address the research objectives stated above, the following research questions are explored and answered:

- What contractual terms are appropriate for a pro-poor prenuptial agreement to secure housing tenure, given the social context of subsidized housing?
- How can a prenuptial agreement template be designed for couples with rights to subsidized housing marrying under the Marriage Act and what form should this take?
- How does this template model stand up to initial testing concerning whether it proves *in principle* the applicability of pro-poor prenuptial agreements to the context of subsidized housing?
- Is the argument that prenuptial agreements should be brought within the land tenure security debate defensible?

1.5 SCOPE OF THE THESIS

The thesis will focus specifically on protecting housing tenure in prenuptial agreements for subsidized housing. It will not assess other provisions capable of insertion in a prenuptial agreement. In view of rapid changes in housing policy and the localization of some of the social and policy aspects, the research will emphasize the Western Cape housing context. The research will be limited to urban subsidized housing awarded by ownership. Private ownership is not necessarily the subsidized housing tenure mechanism used in all rural areas in South Africa, due to customary and farm subdivision considerations. The thesis will not consider rural tenure, as these rights would need to be approached differently in a marital agreement.

While this thesis hopes to be relevant to future research on cohabitation agreements in general, it will be confined to prenuptial agreements under the Marriage Act. It will not recommend content for prenuptial agreements under the Recognition of

Customary Marriages Act. Customary law is a complex specialization, covering a vast range of differing local norms and methods of ascertaining current customary law. There is much research discussion about the manner in which living customary law is being influenced by Western norms and the need for customary law to be developed to accommodate constitutional principles.⁴³ This thesis will not enter the debate about how customary law should be developed. It will however – to a limited extent – explore how prenuptial agreements based on Western common law could be developed to accommodate African and informal norms.

The thesis will also not address prenuptial agreements for couples that marry under the Civil Union Act. Cohabiting gay couples are one of the groups free to solemnize their relationship under this Act, and cohabiting gay couples currently enjoy greater legal protection than other cohabiting couples.⁴⁴ This raises a different spread of issues around support rights for dependents of couples marrying under this Act. Neither will the thesis address contracts entered into under religious marriages not recognized by law, as these marriages have complex contractual underpinnings of their own. It will also not deal with cohabitation agreements between intimate partners, or cohabitation agreements between household members who are not in intimate relationships. It would, however, hope to be a catalyst for further research in each of these fields.

The thesis scope is focused on the design and testing of a model for a pro-poor prenuptial agreement. The drafting is predicated on current tenure approaches that assume that informal practices are as relevant to security of tenure for the poor as the formal law. Most of the theory behind the legal rules used will not be summarized, other than to give sufficient background of the law for the template to be understood by non-lawyers. An in-depth legal theoretical analysis is outside of the thesis scope.

⁴³ C Himonga “Taking the Gap – ‘Living Law Land Grabbing’ In the Context of Customary Succession Laws in Southern Africa” (2011) in H Mostert & T Bennett (eds) *Pluralism and Development: Studies in Access to Property in Africa* 114-139.

⁴⁴ This was the result of the Constitutional Court judgment *Gory v Kolver NO (Starke Intervening)* 2007 3 BCLR 249 CC. People marrying in terms of the Civil Union Act 17 of 2006 can choose to call their formalized relationship a marriage or a civil union partnership. The Act is also open to heterosexual couples, for whom the issues would be the same as couples marrying under the Marriage Act 28 of 1961.

1.6 OVERVIEW OF THE TREATMENT TO FOLLOW

Chapter 2 includes a brief literature review of the extent to which other researchers have used an equivalent methodology to develop pro-poor contract templates, followed by a motivation of the researcher's methodology. The researcher has separate post-graduate qualifications in both law and languages. The thesis is registered in the Geomatics Division of the Faculty of Engineering and the Built Environment. This has allowed for a different methodological approach, able to give equal weight to the formal law and issues of informality.

In South Africa land surveyors and lawyers are the two main professions responsible for the accuracy of records in the deeds registry, making the built environment an appropriate forum to air the subject under study. The approach uses scientific methods of design. The prenuptial agreement template is modelled in a participatory manner, whereby the researcher drafts from her experience as a prior notary. The background discussion does not, however, follow the traditional legal research writing method. The notion that every assertion must be validated does not easily fit the purpose of writing into an environment that must include the fluidity of informality. Legal researchers are advised by the academe to remember that “legal writing is not poetry; it is meant to convince the reader of your point of view, not merely express what you feel or think. Therefore, unsubstantiated assertions and arguments are worthless in legal writing”.⁴⁵ The researcher departs from this approach by also employing tactics that recognize the value of art and literature to remove the theoretical dualism between feeling and thinking. Visual and narrative tools are therefore used as an action strategy both to test the design model and to invite a participatory reader response, such that the images and stories argue the points made (in open-ended direct dialogue with the reader) rather than the researcher unilaterally arguing the points.

⁴⁵ University of Cape Town Faculty of Law *Research, Writing, Style and Referencing Guide: 2014* (2014) 8. An alternative academic view of law and literature is discussed in ch 2.

The strategic collection of facts, as well as the ease with which a human story is remembered, is already a powerful tool used by the academic legal fraternity to explain theory. This teaching process invites students of law to collaborate in producing the legal interpretative grid for such stories, based on their prior taught knowledge. Both the artworks and the stories are used as a dynamic interactive method in the thesis. Fine art is chosen above factual images, due to its capacity to convey universal meanings. The reader is therefore requested to rest a while with the paintings and stories to give their own experience-base time to adjust to the themes. Further motivation for this approach is found in the methodology chapter, alongside the motivation for the approach to the theoretical discussion and data collection.

Chapter 3 deals with the social context of household conflict and tenure insecurity in subsidized housing. Chapter 4 gives the broad legal framework for urban State subsidised housing and prenuptial agreements. Chapter 5 deals with the tenure context of formal legal rules and informal rules. Chapters 3, 4 and 5 each include a fictional narrative to illustrate the subjects. Chapter 6 develops and discusses the prenuptial agreement for testing.

Chapter 7 tests the template by means of housing beneficiary focus groups, municipal and housing official interviews and simulated clients. Chapter 8 evaluates prenuptial contracts as a pro-poor land tenure tool. This is followed by a discussion of the diversification of such tenure rights to balance the formal and informal rights and interests of dependent stakeholders. It concludes with some thoughts on whether the prenuptial agreements researched should be brought within the land tenure security debate and, if so, whether State funding for and facilitation of such contracts is a necessity.

1.7 CONCLUSION

It is a premise of this thesis that the poor are already handling their urban land and tenure conflicts by necessity in the field of private contract. These contracts often play out within the sphere of kinship and household groups. The poor accordingly need the support of the private law to formally support their endeavours. Prenuptial

provisions may be able to establish entry-level rules of law capable of practical, free and private use in the urban context, as well as holding the benefit of being capable of formal registration. They may therefore be a bridge between the broader social contracts already being entrenched (through the formal and informal justice systems respectively) and the formal legal system.

In summary therefore, what the thesis model seeks to test, is whether the following hypothesis is a truth capable of being universally acknowledged:

A poor single person in possession of a subsidized house, who is in want of a spouse, is equally in need of a pro-poor prenuptial agreement.

CHAPTER 2

METHODOLOGY

Note to the reader/viewer

This art image has been removed pending copyright approval.

To view the image on the internet please use:

The artist's name: "Wassily Kandinsky"

and

The title of the painting: "Complex-Simple"

COMPLEX-SIMPLE

Wassily Kandinsky

1866-1944

2 METHODOLOGY

Exitus acta probat – the end justifies the means

2.1 INTRODUCTION

This thesis tests the potential of pro-poor prenuptial agreements to act as a land tool to secure tenure and to pre-empt household conflicts. This is an overly ambitious aim for a Masters thesis and as such the methodological approach must reduce the research to manageable proportions. Kandinsky's painting *Complex Simple* at the opening of this chapter visually illustrates the methodological aim of collating complex social and legal components to compose a simple agreement design.⁴⁶

This chapter will discuss the data selection and experimental prenuptial agreement design. The reasoning behind the evaluative and analytical strategies chosen will be discussed. The background research preparatory to designing the standard agreement is qualitative, with a small quantitative component. It uses an interpretive framework based on pragmatism. The approach to designing and testing the model contract is highly experimental, and the chapter begins with a brief literature review relating to other research that uses equivalent models.

2.2 LITERATURE REVIEW

The experimental aspects of this thesis fall broadly within the design sciences. Brief literature reviews were undertaken regarding aspects of the methods chosen. The term "design science" is used according to Aken's understanding, namely:

...to indicate that the mission of (academic) research in such a field is to develop scientific knowledge to support the design of interventions or artefacts (sic) by professionals and to emphasise its knowledge orientation: a design-science is not concerned with action itself, but with *knowledge to be used in designing solutions, to be followed by design-based action*.⁴⁷

⁴⁶ Kandinsky believed that each musical note represents an equivalent colour. He sought to capture this correlation in his art, making his paintings appropriate to illustrate the attempt in this thesis to correlate the social sciences with the legal discipline.

⁴⁷ JE Van Aken "Management Research Based on the Paradigm of the Design Sciences: The Quest for Field-Tested and Grounded Technological Rules" (2004) 41 *Journal of Management Studies* 219 226.

Contracts can be seen as artifacts used to describe complex relationships.⁴⁸ The researcher constructs a pro-poor prenuptial artifact (that includes both process and a model contract) to design a potential alternative solution to existing land tenure interventions. The researcher participates (in her capacity as a previous notary) acting as one of the research instruments. A preliminary test of design-based action is undertaken by applying the design to clients simulated through a re-storying of real-life events. The literature review does not claim to be comprehensive, in view of the broadness of the field. It did manage to find a number of uses of similar concepts, but no other use of the specific design approach.

A review was carried out to establish whether there is previous research using social issues to act as the catalyst for the design of a prenuptial artifact using a professional participatory approach. No material was found. Karl discusses the problem of legal theory and practice and “defining away the problems that do not have a pre-existing database”.⁴⁹ This is indirectly applicable. Gatenby and Humphries discuss the approach of the researcher as a participant (and the problems and power imbalances inherent in dealing with real life participants as the object and subject of action research) but they do not explore professional participatory research *per se*.⁵⁰ Kesby discusses the role of participatory approaches to dissolve the politics of fieldwork, the power balance between researcher and researched and the dualism of thinking and engagement in praxis. While the broad principles apply, he does not specifically discuss the potential of professional participatory research.⁵¹

On the formal legal end of the spectrum, as Aken notes, professionals such as lawyers solve clients’ problems using their “scientific design knowledge” to plan interventions, with the outcome a design which is “a representation of a system or

⁴⁸ S Passera “Enhancing Contract Usability and User Experience Through Visualization: An Experimental Evaluation” *16th International Conference on Information Visualisation (IV) 11-13 July 2012, Montpellier* 376 376 <doi: 10.1109/IV.2012.69> IEEE, New York.

⁴⁹ TL Karl “‘Not on Your Vita:’ The Relevance of Comparative Politics for Public Life” (2003) 14 *American Political Science Association-CP Newsletter* 14 19.

⁵⁰ B Gatenby & M Humphries “Feminist Participatory Action Research: Methodological and Ethical Issues” (2000) 23 *Women’s Studies International Forum* 89 98-101.

⁵¹ M Kesby “Participatory Diagramming: Deploying Qualitative Methods Through an Action Research Epistemology” (2000) 32 *Royal Geographical Society (with the Institute of British Geographers)* 423 432.

process to be realized”.⁵² The thesis design is sensitive to the need to protect social tenure that is not always formally recognized by conventional land information systems. The literature review accordingly focused on research as a representation of a pro-poor system or process “to be realized.” This is in keeping with informal and formal tenure thinking which challenges notions of fully realized systems.

A range of land information research was traversed, being a field highly relevant to formal and informal land rights artefacts.⁵³ Barry and Roux’s change-based framework for theory development (while not directly analogous) was identified as pertinent to the thesis design in its approach to classification of theory applied in the context of uncertainty.⁵⁴ Their framework highlights the need to examine the networks of relationships and artifacts that inform land tenure information systems.⁵⁵ While they use real-world tests to explain this change-based framework, in a later test by Barry and others (of the Talking Titler prototype) fictitious characters are created to test the design of a self-adaptive land information system. These simulations are based on projected relationships and fictitious interviews.⁵⁶

A review was also undertaken for research on contractual artifacts being tested on clients using the method of re-storied real-life histories, as a preliminary application of design-based action. A brief review of the field of literature and the law showed the primary debate in this field relates mainly to the use of literary theory in *interpreting* the law, not in the re-storying of existing life stories to create simulations for testing theory.⁵⁷ “Legal storytelling” is used extensively, with the main theoretical views of its use falling into either the humanist, hermeneutic or narrative frame.⁵⁸ These storytelling frames are however not generally described in

⁵² Van Aken (2004) *Journal of Management Studies* 225-226.

⁵³ See ch 5.

⁵⁴ M Barry & LM Roux “A Change Based Framework For Theory Building In Land Tenure Information Systems” (2012) 44 *Survey Review* 301 301.

⁵⁵ 302.

⁵⁶ M Barry, R Molero & A-R Muhsen “Talking Titler: Evolutionary and Self-Adaptive Land Tenure Information System Development” (2013) 2 *South African Journal of Geomatics* 1 9.

⁵⁷ See G Binder & R Weisberg *Literary Criticisms of Law* (2000) 78-80. The term “legal fiction” is a theoretical term for assertions that are accepted as true before they are proven. The term should not be equated with creating fictitious characters caught up in events with legal consequences.

⁵⁸ JS Peters “Law, Literature, and the Vanishing Real: On the Future of an Interdisciplinary Illusion” 120 (2005) *PMLA* 442 444-448; RC Richards “Legal Narrative in the Citizens’ Panel: Identifying Theories to Explain Storytelling in a Small Group Deliberation about Ballot Initiatives” *National Communication Association Annual Convention Orlando Nov 15-18 Orlando 2012* (2012).

the context of reframing existing life-stories for client simulations (for fictitious applications) although the need for reframing is recognized as a teaching method.⁵⁹

Van Aken promotes design-based action while rejecting the view of it being un-academic to be much concerned with praxis, “rather like Roman senators who were not supposed to be involved in craft or trade”.⁶⁰ She does not elaborate on specific approaches to subsequent field-testing of a professional design. The thesis test of the contract design on simulated clients can be seen as a preliminary follow up of the “design-based action” to which van Aken refers. A brief review of action legal research literature was therefore undertaken to look for references to *design-based* action. This revealed that clients simulated by the re-storying of real-life histories is not commonly used, although the risks of using real participants to discuss their personal struggles in participatory research are widely recognized.⁶¹

Reason and Bradbury discuss the need for action research that “seeks to bring together action and reflection, theory and practice in pursuit of practical solutions”.⁶² They distinguish between the participatory approach and the postmodern linguistic turn, with its recognition of the crisis of representation. However they do not discuss texts as embodied with a life of their own, able to participate in the generation of meaning.⁶³ Their understanding of the emergent participatory worldview is that we co-create meaning in a participatory and practical form. Their discussion of research approaches is therefore relevant to the experimental manner in which the researcher engages the social datasets, simulated client texts and legal texts. This emergent worldview approach is relevant to the open-ended artefact design that encourages a participative relationship between future poor clients *inter se* and the legal system.⁶⁴

While the use of clients simulated through re-storying cannot be said to be a case study, Flyvbjerg recognizes that classical case studies are themselves composed of

⁵⁹ See JR Abrams discussion of the need to extend the use of reframing in “Reframing the Socratic Method” (2015) *Journal of Legal Education* (forthcoming).

⁶⁰ Van Aken (2004) *Journal of Management Studies* 242.

⁶¹ C Cahill “Repositioning Ethical Commitments: Participatory Action Research as a Relational Praxis of Social Change” (2007) 6 *ACME: An International E-Journal for Critical Geographies* 360 366.

⁶² P Reason & H Bradbury “Introduction: Enquiry and Participation in Search of a World Worthy of Human Aspiration” in P Reason & H Bradbury (eds) *Handbook of Action Research* (2006) 1.

⁶³ 7-8.

⁶⁴ 9-13.

narrative.⁶⁵ He sees as the role of the researcher to “tell the story in its diversity,” leaving “scope for interpreters of different backgrounds to make different interpretations” resulting in a “virtual reality”.⁶⁶ He regards it as necessary to move from rule-governed rationality to tacit skill, with concrete cases “at the very heart of expert activity”.⁶⁷ The closeness of a case study to the real situation is seen as key.⁶⁸ He refutes the rejection of the value of single cases, saying the relevance “depends on the case one is speaking of and how it is chosen” adding that “the strategic choice of a case” may greatly add to its generalizability.⁶⁹ Flyvbjerg’s discussion of the value of case studies for context-dependent knowledge has bearing on the thesis approach of simulating clients by re-storying and the validity of their use.

The review of legal action research methods did not identify any material that recognized the design of pro-poor contracts as a form of action research. While this review does not claim to be comprehensive, a reasonable review of the literature relating to standard contracts did not reveal research on pro-poor template contracts. There is a great deal of research on fixed standard contracts, usually in the market context, and on consumer protection in contracts. No research on designing templates for private pro-poor contracts with flexible outcomes was found, nor any research on designing pro-poor prenuptial agreements.

2.3 MOTIVATION FOR PRENUPTIAL AGREEMENT DESIGN METHOD

2.3.1 METHODOLOGICAL FLOWCHART

The prenuptial agreement will be modelled to correlate with categories of risk identified from a social dataset. After an overview of existing standard contract clauses from a mainstream database of clauses, a sample pro-poor prenuptial agreement precedent, with optional alternative clauses for varying situations, will be designed. The diagram in Table 1 below shows the flow of research from chapter 3 to chapter 7, being the flow from identification of the social and legal issues, though to the design and initial testing of the model.

⁶⁵ B Flyvbjerg “Five Misunderstandings about Case-Study Research” (2006) 12 *Qualitative Inquiry* 219-237.

⁶⁶ 238.

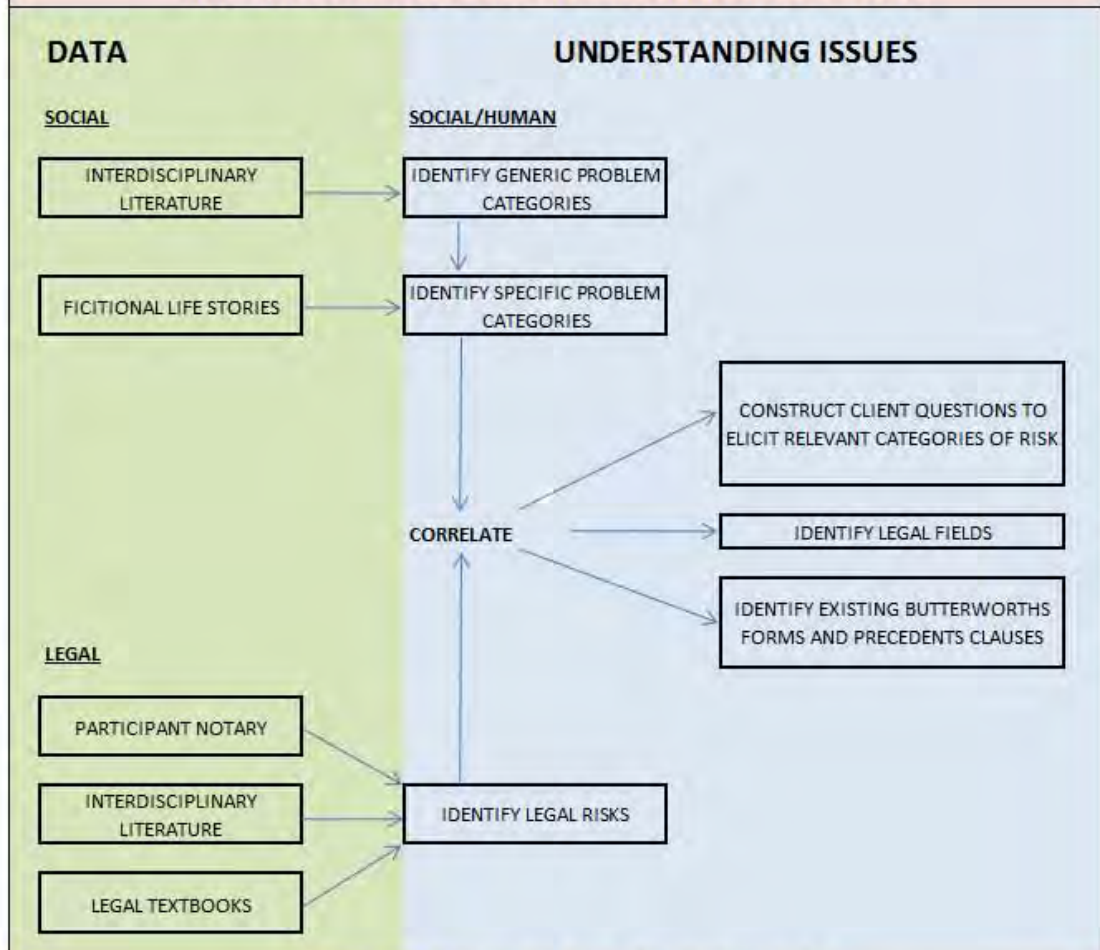
⁶⁷ 221-222.

⁶⁸ 223.

⁶⁹ 225 and 226.

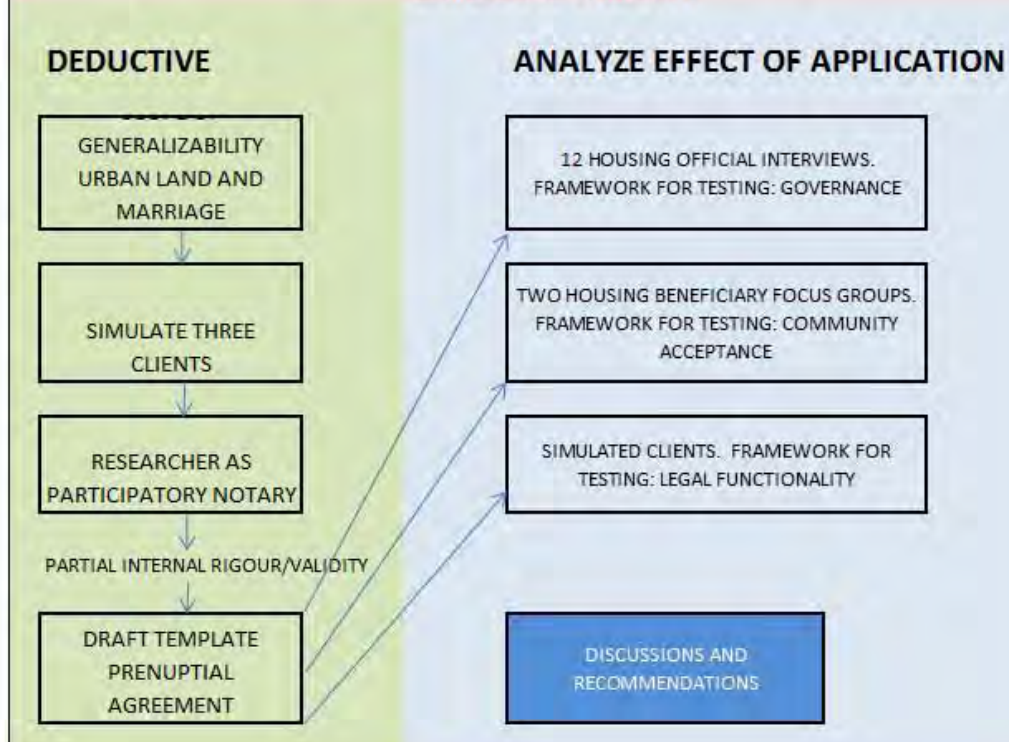
METHODOLOGICAL FLOWCHART TABLE 1

INTERNAL VALIDITY AND TRIANGULATION OF DATA



METHODOLOGICAL FLOWCHART

EXTERNAL VALIDITY



2.3.2 THE INTERPRETIVE PRAGMATIC APPROACH

Creswell summarizes the interpretive pragmatic approach as follows:

Pragmatism is not committed to any one system of philosophy or reality. Individual researchers have a freedom of choice. They are “free” to choose the methods, techniques, and procedures of research that best meets their needs and purposes. Pragmatists do not see the world as an absolute unity. In a similar way, researchers look to many approaches to collecting data rather than subscribing to only one way... Truth is what works at the time; it is not based on a dualism between reality independent of the mind or within the mind. Pragmatist researchers look to the ‘what’ and ‘how’ of research based on its intended consequences – where they want to go with it. Pragmatists agree that research always occurs in social, historical, political and other contexts...⁷⁰

The pragmatic researcher who wishes to utilize different legal subsystems for the design of a model pro-poor standard contract must settle for datasets and definitions they feel work for them. A limited dataset of recent South African books and articles will be used that cover the relationship between family life, land and poverty, written by authors from multiple disciplines. From this dataset common social conflicts (experienced by poor South Africans that lead to loss of housing) will be identified to construct a typical risk profile. Recurring problem areas exacerbated by a lack of access to the formal justice system will be noted and common differences of opinion on rights analyzed, with particular emphasis on the right to security of housing support and future conflict resolution.

2.3.3 GENERALIZATION ISSUES

A preliminary problem is the need for generalization before the research project can commence, rather than undertaking individual tests before showing them capable of generalization to a larger population. Firstly the generic needs of poor housing dependents must be considered as concepts that assume a generalization. Secondly, the law from which the research project must work is both broad (going far beyond the law typically used to draft prenuptial agreements) and narrow (confined as it is to housing tenure and conflict situations) such that doctrinal study must be avoided and

⁷⁰ JW Creswell *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* 3ed (2013) 28.

generalized sources of legal rules sought. Thirdly, many of the couples the thesis seeks to assist reject the law in favour of more accessible informal practices. The emphasis is therefore on the *relationship* of various legal categories to poverty and marriage related housing needs, with the *synthesis* of these in a standard contract as the research aim, not a study of the categories themselves.

The hope of testing the feasibility of such a complex synthesis will be undermined if an in-depth study of legal doctrine or poverty studies is attempted. Accordingly both the legal and the poverty side of the study must be simplified, with extended research postponed. The motivation for a wide sweep that proceeds from various generalizations at the outset is well expressed by Vranken's insight that a jurist "with a broad view is able to think associatively and can be creative and innovative, for example when they make connections that others do not see, or shed new light from an unexpected angle on an existing problem".⁷¹ This thesis will therefore attempt to bring unexplored connections to the surface by using multiple methods to test unusual combinations of legal fields, informal practices and poor housing dependents' marital issues.

2.3.4 MOTIVATION FOR USE OF LIMITED SOCIAL DATASETS

The use of a limited dataset to identify broad social issues can be motivated on the grounds that identifying objective reality in social science is always problematic. This is in accordance with the textual perspective, which, as Samuel puts it, accepts that human "acts and facts are too complex to model in a way that makes accurate and relatively detailed prediction possible".⁷² It is inevitable that this limited dataset will be removed from the original people under study and will already incorporate the interpretative gloss of its authors and researchers. The researcher's own experience will also no doubt affect the areas highlighted. It is therefore recognized on both counts that the poverty themes identified from the texts will be, by necessity,

⁷¹ J Vranken "Methodology of Doctrinal Legal Research: A Comment on Westerman" in M Van Hoecke & F Ost (eds) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (2011) 111 112.

⁷² Samuel describes the textual perspective as the belief that; "there are only texts and thus all knowledge is interpretative. All knowledge is hermeneutics." See G Samuel "Does One Need an Understanding of Methodology in Law Before One Can Understand Methodology in Comparative Law?" (2011) in *Methodologies of Legal Research* 177 189 and 205.

contingent and incomplete. Nevertheless such an approach is adequate for the needs of this thesis, namely to test and categorize the main client variables according to the legal need raised, prior to correlating such variables with legal contractual opportunities.

2.3.5 MOTIVATION FOR USE OF LIMITED LEGAL DATASETS

Our constantly changing law and its interface with the needs of poor households makes a thesis such as this highly complex. This is particularly so in the land tenure context, where extra-legal and informal norms are increasingly being given legal recognition. The research will proceed from a hermeneutic of suspicion with regard to the possibility of finding a canon of South African legal texts capable of definitive study.⁷³ The complexity of legal texts – and indeed their interpretation – often seems in inverse proportion to their meaningfulness for poor clients grappling with parallel informal systems. The post-modern Ecclesiastes conclusion that a proliferation of texts contributes to meaninglessness must act as a caution for jurists.⁷⁴

Perhaps the most complex task the South African legal profession faces is the urgent need for simplification of its law. For this reason the strategy chosen to limit the legal side of the research for drafting the prenuptial agreement will be to use a legal database that already incorporates a general summary of legal rules and clauses drafted for use by generic clients. The database will be situated in a particular timeframe and have a practitioner bias. To this end the primary legal text that will be worked from is the *Butterworths Forms and Precedents* and the introductory explanations.⁷⁵ This will limit an excessive play of possibilities and help facilitate a pragmatic outcome.

While only prenuptial agreements capable of registration under the civil Marriage Act⁷⁶ will be considered, some elementary reading on African customary norms

⁷³ For a further discussion of the elusiveness of the legal canon see J Bell “Legal Research and the Distinctiveness of Comparative Law” in *Methodologies of Legal Research* 155 165.

⁷⁴ “Ecclesiastes” in *Holy Bible: New International Version* 10 ed (2004) 744 754.

⁷⁵ Lexis Nexis *Forms and Precedents Online*.

<<http://www.mylexisnexis.co.za.ezproxy.uct.ac.za/Index.aspx>> (accessed 08-07-2015).

⁷⁶ Act 25 of 1961.

relating to kinship obligation structures will be included. This will be sourced from the same publications used for the general overview of the socio-legal context, most of which include material on African customary issues. This is necessary to ensure the inclusion of clauses appropriate to the large body of clients likely to marry under the Marriage Act, who nevertheless wish to retain a broadly African perspective of kinship duties.

2.3.6 INFORMALITY AND ITS EFFECT ON THE DATASET CHOICE

The thesis topic is situated within two parallel areas of growing informality in the poverty and land tenure context. The one relates to the titling of urban subsidized land and the other to the formalization of intimate relationships. These are both areas in which current statistics show an increasing trend towards informal cohabiting relationships. The reading list will include articles on the effect of legal pluralism, in order to liberate the clients' "text" from being described only in terms of formal law, rather than according to the realities of their own story. Such individual stories are likely in many cases to include informal norms. The drafting of the precedent will focus on creating a legal artifact capable of inclusion in the South African land information system, which must rise to the challenge of also recording informal norms. Formality, informality and the nature of extra-legal approaches have been central to the choice of methodology and whether to embark on a technical legal study of the formal law. This thesis is being housed as an M Phil, not an LLM, with legal doctrine as a parallel data stream and not the essential object of research. This decision was highly influenced by the considerations above.

2.4 RESEARCHER BIAS

The degree of absence of the formal law in the context of transactions relating to subsidized housing – and extended strategies used by the poor to deal with them – points to a rival system of rules that is emerging for the poor. While a further exploration of this is outside the scope of this thesis, the author must state her belief that informal urban land transaction practices are at times more systemic and functional than the formal law. This disclosure is necessary, as the researcher will

self-consciously apply a participatory attorney's approach to designing the model prenuptial agreement. The drafting will be from the perspective of her previous experience (and shortcomings) as a legal practitioner. The researcher's belief in the need to promote certain informal norms must also be stated here, since, as Vranken notes: "Eventually the system is what researchers themselves make out of it, and that can vary from strictly delineated to almost boundless openness."⁷⁷

The researcher's bias is inevitably influenced by her background. She was an attorney, notary and conveyancer with extensive exposure to formal property law in the context of affluence. She has also had substantial exposure to housing waiting lists and informal practices in urban subsidized housing while consulting to a housing department. She has a limited academic teaching background in social law, family law and business law. In addition she holds a post-graduate degree in English literature. Her interest in reader response theory and post-structuralism has no doubt contributed to her being resistant to inflexible metanarratives and receptive to emerging, contingent systems of norms.

The researcher is female, advantaged and white. Her bias on gender issues is influenced in part by considerable exposure to teaching in mainline Christian denominations that represents two diametrically opposed views to wives. One believes in a wife's duty to submit to her husband and a man's duty to act as the protector of all women and children.⁷⁸ The other holds the liberation theology perspective that emphasizes women's self-determination.⁷⁹ In other words one view sees men as needing to protect all women and the other sees women as needing to be empowered to protect themselves. She believes this dichotomy to be present in other religions and various secular worldviews. It is her view that apathy in promoting institutional protection for women is often due to the consequences of this clash itself. The practical protections inherent in each worldview are put on hold pending resolution of this normative disagreement. A stalemate results, despite institutional protection not yet having been achieved in a meaningful way, leaving women and

⁷⁷ Vranken "Doctrinal Legal Research" in *Methodologies of Legal Research* 111 116.

⁷⁸ For a discussion of submission theology see J Maddox "Rise up Warrior Princess Daughters: Is Evangelical Women's Submission a Mere Fairy Tale?" (2013) 29 *Journal of Feminist Studies in Religion* 9 17-20.

⁷⁹ See G West "The Legacy of Liberation Theologies in South Africa, with an Emphasis in Biblical Hermeneutics" (2014) 48 *Studies in World Christianity and Interreligious Relations* 341.

children even more exposed. Vulnerable women must be assisted to survive the passage through the no-man's land that lies in the desert between these two worlds. The researcher is biased in favour of the belief that it is critical that men take up the role of empowering women. Her model template will reflect strategies to open such paths for them, with strong checks and balances.

The researcher's gender bias is managed by her post-structural bias, which is committed to accepting the equality of competing worldviews. In other words she does not allow herself to take an adversarial approach to norms from one particular position. A researcher with an overtly feminist bias would probably work towards a template that secures individual ownership rights for women, removing all male decision-making powers. A researcher with a patriarchal bias would probably work towards a template entrenching male decision-making powers. The researcher's template allows for both routes, while entrenching the overlapping rights of dependents so strongly that neither female nor male decision-making powers can override them. In other words the template works from dependency up, not from gender down. For this reason the research design is non-gendered in its approach, such that it is equally protective – for instance – of vulnerable younger brothers as of vulnerable grandmothers.

2.5 LEGAL METHOD

2.5.1 TRADITIONAL LEGAL RESEARCH METHODOLOGY

The thesis will not take the route of a technical legal inquiry. Accordingly a discussion of the issues surrounding the traditional legal research methodology follows, to motivate the choice of a differing approach. Current debates surrounding legal research include whether the typical manner in which it is conducted fulfils the requirements of science.⁸⁰ This is due to legal research being largely doctrinaire and based on assumptions of authoritativeness with regard to the subject of research, namely the law, which is seen as comprising complex systems of rules found in key archives. In the South African context this view would imply that academic legal

⁸⁰ M Van Hoeke "Legal Doctrine: Which Methods for What Kind of Discipline?" in *Methodologies of Legal Research* 1-18.

research must primarily proceed from an esoteric inquiry into the Constitution, statutes, the common law, oral and codified customary law and case precedent. Scholarly and professional articles, textbooks and drafted contractual precedents are, in this scheme, secondary resources. Legal doctrinal research is seen as both the subject-matter and the theoretical framework for research, making it distinguishable from “legal science.” Westerman denotes legal science as “a mixed bag of other non-legal disciplines that study the law from an independent theoretical framework, which consists of concepts, categories and criteria that are not primarily borrowed from the legal system itself”.⁸¹

The study of law from within the legal discipline itself is therefore generally seen as primarily a hermeneutic exercise in which authoritative legal texts are interpreted, analysed and evaluated.⁸² While accepted as normative within the legal fraternity, this narrowness of focus is often foreign to researchers from other disciplines. Samuel describes this legal presumption by parodying Jacques Derrida’s famous line *il n’ya pas de hors-texte* (there is nothing outside the text), with the statement:

The academic lawyer is not engaged in a research exercise whose aim is to increase knowledge about society as a social reality; the lawyer is engaged in a hermeneutical exercise that has as its subject a legal text and only a legal text.⁸³

The methods employed in legal hermeneutics are regularly compared to those in theology due to the authoritative and doctrinal nature of the texts studied.⁸⁴ It is therefore not surprising that the array of research strategies⁸⁵ used to argue the narrow study of the law as legitimate brings to mind the warning of the sage in the book of Ecclesiastes that “of making many books there is no end, and much study wearies the body”.⁸⁶ The inertia caused by multiplicities of legal meaning must be overcome if highly practical pro-poor legal applications are being tested. This is particularly so if one wishes to explore the world of the poor, in which the law is often far from being authoritative.

⁸¹ PC Westerman “Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law” in *Methodologies of Legal Research* 87 94.

⁸² Van Hoeke “Legal Doctrine: Which Methods” in *Methodologies of Legal Research* 1-18.

⁸³ Samuel “Methodology in Comparative Law?” in *Methodologies Of Legal Research* 180.

⁸⁴ Bell “Legal Research” in *Methodologies of Legal Research* 155 160.

⁸⁵ For examples of these strategies see Van Hoeke “Legal Doctrine: Which Methods” in *Methodologies of Legal Research* 1-18.

⁸⁶ “Ecclesiastes” in *Holy Bible* 754.

2.5.2 DEFINITIONS FOR THE PURPOSES OF THIS THESIS

For its legal component this thesis will take as its departure point Kroeze's conceptual framework of the law as both a hermeneutic and a professional discipline.⁸⁷ This is not to presume that this framework is regarded as the final word on how to describe the law as a science or discipline. Nevertheless even the most radical post-structuralist must concede the pragmatic researcher's right to make a start. This definition is chosen because it offers a workable vantage point from which to approach the law for the purposes of this thesis. Accordingly, the authoritativeness of the law (as researched in its own esoteric, largely structural manner) is accepted, as well as its professional nature.

In line with the traditional view of legal research, Kroeze, quoting Balkin, comments further that interdisciplinarity is not feasible for lawyers, as their own disciplinary training not only *does not* teach empirical research methods, it actually teaches them *not to* think empirically. This, she adds, results in lawyers not being equipped to do natural and social science research.⁸⁸ This is stated in another way by Bell who notes that the hermeneutic approach, "which takes legal rules and principles as authoritative reasons for action, clashes with the more empirical and relational analyses of other social sciences."⁸⁹ This thesis attempts to avoid such a clash by complying with broader scientific norms and a more empirical approach. This is more in keeping with current land tenure thinking that aims to recognize social tenure not recognized by law in a relational manner, as discussed in chapter 5.

2.5.3 CLIENT VARIABLES AND LEGAL DRAFTING VARIABLES

The approach to the pro-poor prenuptial agreement will be limited to the contractual drafting role of an attorney who is a notary, with the client as the attorney's reason for being. In South Africa attorneys are those members of the legal profession who deal with clients direct. Many – if not most – advocates, judges, legal advisors and

⁸⁷ AJ Kroeze "Legal Research Methodology and the Dream of Interdisciplinarity" (2013) 16 *PER* 36.

⁸⁸ Kroeze (2013) *PER* 55 with reference to JM Balkin "Interdisciplinarity as Colonization" (1996) 53 *Wash & Lee L Rev* 969.

⁸⁹ Bell "Legal Research" in *Methodologies of Legal Research* 159.

academics are exposed to a limited view of the client, with the content of consultations with clients, litigants and witnesses already reduced by other intermediaries. For the attorney who meets clients face-to-face, every client (and their documentation) presents as a case study. As Siems correctly notes, for this reason “legal practitioners have more experience in applying the law into different socio-economic contexts”.⁹⁰ It is surprising that it is not commonly acknowledged that practitioners who specialise undertake a great deal of in-depth fieldwork as a natural part of their work. As Heinz and Holden note in their discussion of the variables that relate to the legal profession:

The fields of law differ in their substantive doctrines, in the characteristic tasks, in the settings in which the fields are practiced, and in the social origins of its practitioners. But we hypothesize that these differences are secondary to yet another variable: the type of client served. We suggest that differences between clients profoundly influence many of the other types of differentiation among the fields that the legal profession is, to a great degree, externally orientated, and in consequence is shaped and structured by its clients.⁹¹

The thesis will proceed from the view that when an attorney applies the law to the marital issues of a succession of poor clients a number of empirical processes are indeed triggered. The factual variables of each client’s needs must be observed and identified by the attorney in the consultation and document collection phases, after which the relationship of these variables to legal theory evidenced in doctrinal legal texts (which also incorporate numerous variables) must be considered. As Heinz and Laumann note further: “Many of the recognized fields of law correspond to bodies of doctrine generally regarded as distinct legal subjects and taught as separate legal courses in law school, –e.g. crimes, real estate, commercial transactions, personal injury, tax, labour, corporations, antitrust, and securities.”⁹² This results in lawyers thinking “in terms of categories of work that distinguish, within broader doctrinal areas, fields or sub-fields defined by the types of clients served.”⁹³

⁹⁰ M Siems “A World without Law Professors” in *Methodologies of Legal Research* 71 77.

⁹¹ JP Heinz & EO Laumann “The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies” (1978) 76 *Michigan Law Review* 1111 1113.

⁹² 1113.

⁹³ 1113.

If a contract is being drawn, after the attorney has identified which of the variable categories of law apply, a suitable existing template will usually be identified based on the outcome of this process. This will be used with or without adjustment. If the circumstances require it, some standard clauses will be rejected and others will be individually drafted. Advising successive clients on similar issues therefore results in a reiteration of the theoretical legal questions researched and applied, in a manner capable of replication by another attorney. When another client with similar needs seeks legal advice, the attorney can proceed from a hypothesis with a predicted outcome, likely to be capable of future validation. Such a methodical application of the law has many similarities to the manner in which theories are tested in other scientific disciplines. A distinctive strategy of this thesis will be a refusal to reject client variables on the basis of preconceived ideas of practices as outside of the law. The emphasis will be on the need to give informal practices a voice if at all possible.

2.5.4 THE ATTORNEY'S ROLE AND THE SCIENTIFIC METHOD

If the professional attorney's role is seen in this way, as a scientific method, the attorney may be seen as validating legal theory by proving it capable of application to client needs. From this perspective it is not the personal circumstances and actions of the *client* that requires validation (by virtue of their needs being capable of being served by current legal theory) it is the *law* that requires validation according to its capacity for application to the clients' circumstances. While this view might be hard to argue in some areas of law, it is particularly true of a field such as that of prenuptial contracts, being as they are informed by subjective intention. While such a client-centred approach begs the question about the authoritativeness of the legal system, it is nevertheless much closer to the traditional understanding of the nature of science, in terms of which theories must be tested and considered falsifiable, yet able to withstand attempts to show them to be false. Attorneys who deal with the poor (and apply the normal methods of researching and applying the law) regularly find that the poor as a class have minimal access to current legal constructs. If the law is rendered invisible by making the poor visible, this must result in a finding that the legal theory represented by existing law is falsified when proven incapable of application in the context of poverty.

A poor client's self-centred focus will be conceptualized as having theoretical validity equivalent to the self-referential authoritativeness of legal doctrine. Accordingly the professional component of Kroeze's definition of the discipline of law will be narrowed. It will be confined to the description and interpretation of the inter-textual possibilities situated between the "story" or "text" of poor clients' lives and the "text" of existing authoritative law. Such a post-structural approach (that elevates the marginalized texts of poor client's circumstances to equality with the metanarrative of legal doctrine) might be summarized with a further parody of Samuel's⁹⁴ lines, namely:

The professional lawyer is not engaged in a research exercise whose aim is to increase knowledge about the law as a legal reality; the lawyer is engaged in a hermeneutical exercise that has as its subject the client's legal story, and only the client's legal story.⁹⁵

Despite this vigorous view of the client, the mixed bag of research methodologies chosen for this thesis does not aim to bury the authority of our formal juristic Caesar. It aims to test a marital construct from which Caesar might rise to praise the norms of poor clients. This approach may however need to bury the notion that equality for the married-poor should result in forced community of property (as is presently the case) while equality for the married-affluent results in the freedom to contract out of it. Accordingly, while the research may have some overtones of social constructivism, critical theory and transformative interpretative approaches, its direction will be primarily pragmatic, namely that the law must *work* when applied on behalf of the poor in the contexts studied.

2.6 TRIANGULATION METHODS

The scientific method encourages the use of triangulation to assist with testing assumptions. Three strategies will therefore be used to test the validity of the use *in principle* of a pro-poor prenuptial agreement.

⁹⁴ Samuel "Methodology in Comparative Law" in *Methodologies of Legal Research* 177-208.

⁹⁵ The researcher's wording is used for this second parody.

2.6.1 HOUSING BENEFICIARY FOCUS GROUPS

The first triangulation strategy to test the validity of the prenuptial approach will be two sets of housing beneficiary focus groups. A group of cohabiting beneficiaries will be asked to discuss whether they feel couples would wish to agree the terms under study, prior to marriage. The group focus will be on social issues triggering legal matrimonial property needs. This will test community acceptance of such agreements. The focus group method was chosen above the interview method, due to the fact, as Kitzinger succinctly states it, that they do not “discriminate against people who cannot read or write and they can encourage participation from people reluctant to be interviewed on their own or who feel they have nothing to say”.⁹⁶

2.6.2 MUNICIPAL AND HOUSING OFFICIAL INTERVIEWS

Large numbers of residential properties in South Africa are previously State-subsidized properties capable of private ownership. This makes the governance issues triggered by the incapacity or unwillingness of subsidy beneficiaries to support their dependents a national issue, the impact of which goes far beyond private law rights and duties. The second triangulation strategy used will therefore be housing official interviews to test governance issues.

The interviews will have both a quantitative aspect and a qualitative aspect. Structured questions will be asked on the governance issues surrounding pro-poor prenuptial agreements and subsidized housing. This will be followed by a brief unstructured interview, for the reasoning behind their answers and to gain their perspectives on the value of such agreements. Most housing officials have no legal training and accordingly are not equipped to comment on the legal impact of prenuptial agreements. Accordingly municipal managers with specific legal training (to whom housing officials are ultimately accountable) will also be interviewed for a more legally orientated response. This leg of the research will assess the value of pro-poor prenuptial agreements from the perspective of the potential value of such agreements to the State and society, not the value to the individual. Due regard will

⁹⁶ J Kitzinger “Qualitative Research: Introducing Focus Groups” (1995) 311 *BMJ* 299 299.

be given to the ethics of State interest being considered in the area of private marital norms.

2.6.3 CLIENT SIMULATIONS

The third triangulation strategy will be to simulate clients by re-storying existing facts of real clients, to apply the agreement to their context, in order to record how it succeeds or fails to meet their legal needs. For reliability, “clients” will be constructed from different sources. The first uses the facts from a case study recorded in recent research on urban land titling in the Eastern Cape. The second uses the client facts recorded in a contemporary urban land rights court case of customary bent – *Bhe vs Magistrate Khayelitsha*.⁹⁷ The third re-stories the facts of a particular household in *Government of the Republic of South Africa v Grootboom* – a very influential housing precedent.⁹⁸ Both of the court cases used arose in the Western Cape and resulted in seminal Constitutional Court decisions that changed the direction of South African law.

2.7 MOTIVATION FOR USE OF LITERARY METHODS

As far as the researcher is able to ascertain from the brief literature review, the literary methods in the thesis have not been used in previous legal research to test standard legal contracts. Three literary approaches are taken, as discussed below.

2.7.1 FICTIONAL LIFE STORIES TO ILLUSTRATE CONCEPTS

The fictional life stories used in this thesis take the form of hypothetical cases.⁹⁹ All the stories fall within the boundary of a couple whose marriage will affect security of tenure in State subsidized housing. There is a dearth of case precedent recording practical facts relevant to the poor, due to their recognized inability to access the

⁹⁷ *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; SA Human Rights Commission v President of the RSA* 2005 1 BCLR 1 (CC).

⁹⁸ *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC).

⁹⁹ A life story can be defined as “a biographical narrative recounting the life of an individual within its surrounding social context” *SAGE Research Methods Online* <http://srmo.sagepub.com/searchresults?f_0=QSEARCH_MT&q_0=life+story> (accessed 1-07-2015).

formal justice system. Such stories make the systemic consequences of intimate relationships on subsidized housing more visible, often in a much more succinct manner than wordy descriptions of the underlying social, legal and economic theories. This is in keeping with the humanist view of literature's role in conveying the human meaning of legal concepts.¹⁰⁰

The content of the fictional stories narrated in this thesis is based largely on combination of situations encountered in the past work and reading of the researcher. This experience includes considerable exposure to the collection and recordkeeping of housing dependent's details, as used for the housing waiting list and later land registrations. It also includes the assessment of over 100 potential claims for a pilot urban "RDP" land title adjustment project.¹⁰¹ The researcher initiated the project and working on it gave considerable insight into common stressors. A retired senior judge had offered to act as commissioner and the intention was to create relevant precedents for other commissioners. The project has not to date materialized and the privacy of the participants must be maintained. The fictional life stories narrated in this thesis traverse similar ground, albeit narrowly in the cohabiting context. There will be minimal analysis of the fictional stories in this thesis. They are left open to individual reader response, as the expertise of many disciplines must be brought to bear on the problems they illustrate. It is hoped the stories will act as a catalyst to analyze how the grand narrative of the reader's own institution (legal or otherwise) has embedded itself in such stories.

2.7.2 RE-STORIED REAL-LIFE STORIES TO SIMULATE CLIENTS

The client simulations in the thesis are achieved by the re-storying of recorded facts of the lives of real people. The thesis will approach these simulations from the hermeneutic textual perspective.¹⁰² In other words it will be recognized that any

¹⁰⁰ Peters (2005) *PMLA* 444.

¹⁰¹ L Downie "Urban Pro-poor Registrations: Complex-Simple the Overstrand Project" (2011) 14 *PER* 119.

¹⁰² Hermeneutics is described as differing from other forms of interpretation in that it pays attention to the text not only "as a closed system of signs, but also as a non-ostensive discourse with the reader" with the reader "re-appropriating" or "re-enacting" the meaning. Corradi C "Text, Context and Individual Meaning: Rethinking Life Stories in a Hermeneutic Framework" in *SAGE Biographical Research* 2 (1991) 343 345 <<http://srmo.sagepub.com.ezproxy.uct.ac.za/view/sage-biographical-research/SAGE.xml>> (accessed 06-07-2015).

recorded life history (including the effects of the interpretative lens of the author) acquires a life and being of its own, capable of social and political consequences. The decision to use client simulations rather than case studies is accordingly based upon narrative research premises, dislocated within the hermeneutic frame.¹⁰³ The simulated client's personal stories will be re-enacted using their original context (with appropriate privacy) for the purposes of the tests. Each story will then serve as a text from which a retrospective simulation can be run (of the tenure consequences) had an early titleholder entered into the prenuptial agreement. This process is defined in narrative research inquiry as "re-storying," which is defined by Creswell as "the process of reorganizing the stories into some general type of framework".¹⁰⁴

The re-storying to which Creswell refers is usually undertaken in the secondary research context, with continued reference to the original parties. "Vignettes" are also used, with stories illustrating specific social contexts for group discussion. In the first instance the real people remain indirectly connected to the narrative, and in the second the stories are entirely fictitious. The researcher's approach is therefore distinguishable. Nevertheless the hermeneutic understanding of texts is by now trite, namely that every story acquires a life of its own, that is separate from the original text. This is illustrated in part by Derrida's point that there is nothing outside the text. On a practical note, as Budlender notes, the "life story" included in divorce pleadings and affidavits is highly standardized, due to "the significant role of lawyers in determining what an acceptable story-line for such an application looks like".¹⁰⁵

The *Bhe* and *Grootboom* cases used for re-storying in chapter 7 of the thesis have become part of South Africa's grand narrative of land, housing and relationships. The reliability and validity of the facts of life stories recorded in case law lies in their institutionalization within legal precedents. They have therefore been the catalyst for "stories" in many different disciplinary genres (for which the background of the writer is likely to have been as significant as the life story itself) such that the "life story" is constantly reconstructing itself. Alden, and Anseeuw write of the manner in

¹⁰³ Creswell describes narrative research as follows; "narrative is understood as a spoken or written text giving an account of an event/action or series of events/actions, chronologically connected" Creswell *Qualitative Inquiry* 70.

¹⁰⁴ 74.

¹⁰⁵ D Budlender "In Whose Best Interest? Two Studies of Divorce in the Cape Town Supreme Court" (1996) 3 *Issues in Law, Race and Gender* 4.

which national land narratives are politically constructed.¹⁰⁶ The themes for such constructions, and other private reconstructions, are often found in the facts of real people's lives that are redefined according to individual interpretations. The thesis therefore takes the view that additional private reconstructions are legitimate, provided the interests of the real people are respected. Such reconstructions grow the potential for new national narratives of kinship, land and the self.

2.7.3 LITERARY WORKS AND ART IMAGES FOR READER RESPONSE¹⁰⁷

Brief references to two classical literary works and eight art images will be used as an aide to provoke reader responses to the universal issues underlying the legal discussion. This will follow the narrative approach to texts, an approach often used to express the views of the powerless.¹⁰⁸ This will be from a social constructionist point of view, which, as Hyland puts it, locates the reader and participant relationships "at the heart of academic writing".¹⁰⁹

As Regan notes (with reference to Gadamer) readings open up an "infinite dialogue with others in a fusion of horizons" such that the transient nature of the text "pragmatically moves on when the message is revealed".¹¹⁰ This stems from the concept of "play" taken from the aesthetics of experiencing art, with the author and interpreter part of "a game in motion".¹¹¹ The process of a reader's response to a text or image is not therefore something that a researching author can witness,

¹⁰⁶ C Alden, W Anseeuw & C Alden "Regionalisation of Norms and the Impact of Narratives on Southern Africa Land Policies" (2010) in W Anseeuw & C Alden (eds) *The Struggle over Land in Africa: Conflicts, Politics & Change* 265-278.

¹⁰⁷ The life story method for mediating different normative views of land rights is explored in L Downie *The Life History of Ruth as Conflict Resolution Mechanism* (2012) unpublished manuscript (copy on file with author). The reflection triggered by this project began the thought processes ultimately resulting in this thesis. The researcher thanks the (anonymous) academic whose foundational ethics served as the catalyst for the manuscript and M Orr, professor of modern languages, University of Southampton, for her input.

¹⁰⁸ Peters (2005) *PMLA* 446-447. This approach is often used by feminist theorists.

¹⁰⁹ K Hyland "Bringing in the Reader: Addressee Features in Academic Articles" (2001) 18 *Written Communication* 549 550.

¹¹⁰ P Regan "Hans-Georg Gadamer's Philosophical Hermeneutics: Concepts of Reading, Understanding and Interpretation" (2012) IV *Meta: Research in Hermeneutics, Phenomenology, and Practical Philosophy* 286 291 and 299. With reference to HG Gadamer 2 ed (2004) *Truth and Method* and HG Gadamer 2 ed (2004) *Philosophical Hermeneutics*.

¹¹¹ 300. As L M Rosenblatt also notes in "The Literary Transaction: Evocation and Response" any "reading event falls somewhere on the continuum between the aesthetic and the efferent poles; between, for example, a lyric poem and a chemical formula". (1982) 21 *Theory into Practice* 268 269.

capture or draw conclusions from. This is due both to the temporality of interpretations and their infinite nature. Such reader responses nevertheless have “scholastic resonance,” opening up as they do “the many alternate possibilities of the text” and moving towards new understandings that go beyond the original research writing.¹¹² As such the reader response strategy used in this thesis constitutes an open-ended aspect that can provide deeper understanding.

Both the classical works chosen illustrate the impact of relational systems on the land rights of powerless family members. While the content is archaic, the works chosen raise multiple themes discussed in other contexts later in the thesis. Barry points out that ancient conveyancing systems can be found in certain religious texts such as the *Book of Jeremiah*.¹¹³ Accordingly a life story from another book in the Bible, the *Book of Ruth* will be used to highlight women’s tenure within a patriarchal culture, to demonstrate this method.¹¹⁴ As part of a sacred text it has been formative for many religions, with the Bible also being a founding text for Western culture.

The summary of the plot is selective and includes additional background drawn from other parts of the Bible, to assist with explaining the tenure outcome. It uses a land tenure reading-lens to identify the elements of Ruth’s life story relevant to this thesis. It is recognized that other interpretations will vary, based on which aspects of the account they choose to emphasize. Some modern tenure terminology is used to draw attention to parallels with contemporary African tenure debates.

The *Book of Ruth* opens with a famine. Naomi, her husband Elimelech and their two sons move to another area, Moab, to survive the results. Elimelech dies and the sons marry foreign wives, Ruth and Orpah. Marriage to Moabites is frowned upon by Elimelech’s home community. Both sons die, leaving the women without male protectors in the household. Naomi decides to return to her homeland, which is once more experiencing plentiful harvests. As a vulnerable widow, Orpah returns to the protection of her family of birth. Ruth returns with her mother-in-law and pledges

¹¹² P Regan (2012) *Meta: Research* 301.

¹¹³ M Barry & LM Roux “A Change Based Framework” (2012) 44 *Survey Review* 301 303.

¹¹⁴ “The Book of Ruth” in *Holy Bible* 289-292.

allegiance to Naomi and her kin. This means the two women must look to the relatives of their deceased husbands for support.¹¹⁵

Rights to land are patrilineal. Support duties follow specific rules based on ties of kinship. Transfer of land is subject to certain restrictions, aimed at securing the rights of a particular family line. The right to control over land is subject to the responsibility to protect the interests of dependents of the deceased. This imposes a duty to support any women and children left unprotected by the death of a male line. Naomi has an interest in a particular parcel of land through her deceased husband, but male relatives must choose to take transfer of the land and accept the custodian duties.¹¹⁶ The women's right to protection is not honoured and Ruth is reduced to gleaning wheat for herself and Naomi. Gleaning rights follow normative rules and are aimed at alleviating poverty. The fact that Ruth needs to glean indicates that – despite plentiful harvests and Naomi's interest in land – the women are poor and not perceived as having direct rights to land and crops.

A remote relative, Boaz – a landowner of standing – takes an interest in Ruth's plight. The mother of Boaz is described elsewhere in the Bible as having originally been a prostitute who acts heroically in the nation's interest. This results in Boaz's father marrying her.¹¹⁷ The legitimacy of Boaz's own place in the kinship genealogy is therefore predicated on his birth *after* his mother's social position was altered by marriage.¹¹⁸ This is something likely to affect his view of Ruth's position as an outsider. Naomi advises Ruth that when Boaz goes to sleep at the barley threshing-floor, she should perfume herself and put on her best clothes then uncover his feet and lie down, before requesting that he take up the role of "kinsman-redeemer".¹¹⁹

¹¹⁵ Some customary communities would regard return to the natal family as the appropriate response for a woman whose marriage was not formally recognized by the husband's family, and remaining with the husband's family as appropriate for a recognize widow.

¹¹⁶ This speaks into the rights and interests debate in land rights or land tenure continuums.

¹¹⁷ Christian tradition places Rahab as the mother of Boaz. Jewish tradition does not. Both traditions generally interpret Rahab as having been a prostitute and a great Biblical figure. See B Chodos "We Don't Have the Virgin Mary, But ..." (2011) 33 *Consensus* 1 5-6.

¹¹⁸ This speaks into the vulnerable position of children who cannot prove parenthood.

¹¹⁹ A feminist reading would emphasize the likely sexual nature of this act.

Boaz calls a meeting with ten elders and the immediate kinsman with primary responsibility towards the women.¹²⁰ He suggests the kinsman buys the property from Naomi. He agrees, after which Boaz insists this means he must “acquire” the widow Ruth “in order to maintain the name of the dead with his property”.¹²¹ The kinsman refuses to do so, saying that accepting the simultaneous responsibilities towards the women will endanger his own estate. Boaz steps into the breach as the next kinsman in line. Transfer of the property takes place by the first kinsman removing one sandal and delivering it to Boaz. This is recognized as “the method of legalizing transactions” for transfer of land.¹²²

Boaz accepts the restriction that the land will not belong to him, but will be held in trust to ensure the original family line continues to belong to the land.¹²³ He confirms that he will “acquire” Ruth as his wife so that her first husband’s “name will not disappear from among his family or from the town records”. Ten elders and all those at the town gate verbally confirm they are witnesses to the events.¹²⁴ The witnesses then praise the union and orally testify to parallel genealogical precedents of specific women that built up the nation and their family. The sacrifices inherent in Ruth and Boaz’s acts make them the heroes of the story. God honours their virtue with the birth of a son.¹²⁵ The narrative ends on a praise song about them and how they sustain Naomi, before ending with a genealogy of the future illustrious descendants of Boaz and Ruth’s line.

An analysis of the account reveals that the poor women’s tenure was secured not only according to existing normative rules for landholding, but through the restoration of kindred relational ties. It also confirms that the land information system of the day was constituted primarily of genealogical records that were part of the collective memory, re-affirmed orally. Land was not seen as belonging to people, people were seen as belonging to land by descent or marital relationship.

¹²⁰ All the proceedings entrenching land rights are verbal.

¹²¹ 292. Note this is known as the levirate system. Levirate systems are still used in some customary environments in South Africa.

¹²² 292. Physical “RDP” title deeds in other people’s names are given as a symbol of transfer in various poor communities in South Africa. The symbolic nature of the handover can therefore be seen as an equivalent to the handover of the sandal in *Ruth*.

¹²³ This reflects a custodian view of land still common in some customary environments.

¹²⁴ Elders are still used in some customary environments to witness land transactions.

¹²⁵ This illustrates family land tenure entrenched through the firstborn son.

The inclusion of the future genealogy points to the fact that land is not held as a private entitlement, but in trust for future generations who are related.

One interpreter will see this narrative as honouring women who submit to kinship norms, and honouring men who protect women and children. Another will interpret the narrative as reflecting reprehensible *mores*, with women acquired as if they are property. The story raises key pragmatic questions still relevant to South Africa today. Should marriage in the 21st century still determine the transfer of land? Should the use-rights over land of needy dependents still be tied to the unfettered discretion of those upon whom they depend? The *Ruth* story illustrates complex relational ties and tenure power structures in a much more succinct and accessible manner than a theoretical description of the issues.

The reader response strategy is overtly used in this thesis in respect of the two literary classics and the art images. The process is however equally relevant to the reader's reception of the fictional life stories, the simulated clients and all other writing. In real life the boundary line between the formal law and informal norms is blurred. From the outset the researcher wishes to present this boundary to the reader as fluid. It is a "game in motion" from which infinite new meanings may emerge; a game in which the author and the reader each represent but one of many players.

2.8 CONCLUSION

The methodology discussed above will now be applied in chapters 3 to 7. The researcher would prefer to write the chapters that follow according to the Consumer Protection Act's approach to language, in terms of which "the ordinary consumer of the class of persons" for whom the contract is relevant could be expected "to understand the content, significance and import".¹²⁶ Unfortunately this is not possible within the confines of academic standards, in view of the low-literacy of many of the people the thesis hopes to benefit.

¹²⁶ S 22(2) Consumer Protection Act 68 of 2008. This Act is not applicable to parties entering into prenuptial agreements.

Nevertheless it is recognized that language is political, and that the use of academic modes of discourse in the context of poverty-related research is problematic.¹²⁷ It can exclude from the debate the voices of almost everyone without recent tertiary education, thereby furthering the inaccessibility of the law and other research. An attempt will therefore be made to use the ordinary meaning of words wherever possible and to avoid highly theorized definitions that no longer support prevailing colloquial usage. This is based on the view that if words entrenching rights and interests are not fully understood and appropriated (by the people they aim to protect) they are the seeds that carry the future abuse of rights.

¹²⁷ On the political nature of language and human settlements see T Berlanda “Umujyi: Cities and Human Settlements in Rwanda” (2012) *Sustainable Futures: Architecture and Urbanism in the Global South*, 27 – 30 June 2012, Kampala, Uganda (2012) 136 137
<https://www.google.co.za/?gws_rd=ssl#q=BERLANDA+UMUJYI> (accessed 15-07-2015).

CHAPTER 3
THE SOCIAL CONTEXT OF TENURE INSECURITY
IN URBAN SUBSIDIZED HOUSING

Note to the reader/viewer

This art image has been removed pending copyright approval.

To view the image on the internet please use:

The artist's name: "George Pemba"

and

The title of the painting: "Mother Feeding her Child"

MOTHER FEEDING HER CHILD

George Mnyalaza Milwa Pemba

Eastern Cape 1912-2001

3 THE SOCIAL CONTEXT OF TENURE INSECURITY IN URBAN SUBSIDIZED HOUSING

In practice, however the question of ownership was less fraught than complications around marriage and partnerships...

*Marriage Land and Custom*¹²⁸

3.1 INTRODUCTION

The aim of this chapter is to highlight key social issues that impact on family housing conflicts and tenure insecurity in urban subsidized housing. Pemba's painting *Mother and Child* invites the viewer to "look through the window" into the private life of a dignified – but impoverished – mother and her child. This image of vulnerable dependents in a low-cost house provides the backdrop to the social context that will be discussed in this chapter.

The poor often live their lives at the interface of the formal and the informal, both legally and socially. Their hope of acquiring substantial assets before or after marriage, or having access to adequate legal advice, is slender. This makes the consideration of future legal consequences relating to their estates remote. Building a contractual bridge to help the poor to voluntarily move towards formalizing their rights between each other is therefore no small task, with low literacy further complicating matters. Any attempt is made more difficult by the fact that should they wish to use legal processes, legal practitioners take as a given an absolute commitment to the formal law. Notaries and conveyancers are particularly orientated towards highly formalized processes, being the gatekeepers of the legal records filed in the Deeds Registry. For many of them, the concepts that underpin a pro-poor prenuptial agreement are likely to be seen as a contradiction in terms.

This chapter will commence with a fictional life story that focuses on inter-personal conduct that is outside of the current formal marriage and legal processes. It serves

¹²⁸ D Budlender "Women, Marriage and Land: Findings From a Three-Site Survey" in A Claassens & D Smythe (eds) *Marriage Land and Custom: Essays on Law and Social Change in South Africa* (3013) 28 29. Note while the survey under discussion was in a rural area, the Western Cape has many beneficiaries previously from rural areas.

as an example, in the microcosm, of the socio-legal complexity under discussion. This will be followed by a macroscopic view of subsidized housing and marriage. Examples of social causes contributing to complexity in the marriage, land and succession approaches of the target group will then be considered. This will be with particular reference to the hybridization of marital culture and the effect of socially embedded norms. After the discussion above, a limited dataset will be used to identify specific social issues. The aim will be to reduce the social complexity discussed to manageable proportions, capable of initial categorization. This will then be followed in later chapters by a correlation of these social issues with a pro-poor prenuptial agreement process.

3.2 FICTIONAL LIFE STORY

The protagonist in this chapter's life story is Justice, a man who moved to the Western Cape from a rural area in the Eastern Cape with his life partner, Memory. He gains sole title to an urban subsidized house and some years later Memory passes away. Her estate is not reported to the Master of the High Court and is therefore not wound up. Only one 14 year-old son of their relationship is still dependent, Second-Born. His birth was registered in his mother's surname. Due to a job offer in the rural area from which Justice came, Justice moves back. He rents his subsidized house to Joy who has a 10 year-old daughter. Part of the arrangement is that Second-Born will reside with Joy to complete his schooling and Justice will stay in the house when he returns to visit. Justice develops a relationship with Joy and she falls pregnant. He now wishes to enter into a civil marriage with her. However Joy is concerned that if he dies the family of Memory might claim the property and evict her. Justice wishes to protect her and their baby from this, but also wants Second-Born protected. He does not regard Memory as having been his customary wife. He is of the view that a will is culturally inappropriate and feels his brother should make the decisions about the property on his death. It would then be his brother's role to ensure the protection of Second-Born's interest in the house, as well as Joy and the baby's interests. Justice feels his new wife and stepdaughter should have no say on his brother's decisions regarding how to give effect to this.

3.3 GOVERNMENT SUBSIDIZED HOUSING IN SOUTH AFRICA: MARRIAGE, POVERTY HOUSING RELIEF AND TENURE

Statistics South Africa reports show that large numbers of South Africans still choose formal marriage to define their social identity.¹²⁹ In their article “Marriage and Co-habitation in South Africa: An Enriching Explanation” Moore and Govender discuss declining marriage rates. Possible causes are listed as the state of the economy, HIV, rural-urban migration, urbanisation, globalization and high bride-wealth payments, with urban areas noted as having lower marriage rates than rural areas.¹³⁰ The default in community of property regime has not yet come under the spotlight as a possible further cause.

South Africa’s formal marriage statistics are based on the Department of Home Affairs records, in which unregistered customary and religious marriages are not noted.¹³¹ The statistics indicate that the majority of customary marriages are not registered in the year they occurred.¹³² The number of cohabiting couples overall is high.¹³³ The fact that marriage is still a significant social institution, as well as the high numbers of cohabiting couples, shows that research within the marriage paradigm remains necessary. This is true irrespective of the current debate whether kinship still organizes society, and the calls for family law to move away from ideological approaches that centre on marriage.¹³⁴

Economic constraints affect choices to formalize household cohabiting structures. This inevitably has a far-reaching impact upon urbanisation and housing issues. The General Household Survey of 2014 indicates that 15.3% of South African households live in “RDP” or State subsidized dwellings.¹³⁵ The National Department of Human Settlements indicated in October 2014 that 3.7 million houses had been provided by South African government subsidies since inception of the

¹²⁹ Statistics South Africa *Marriages and Divorces 2013* 2-5 (30-04-2015) <http://www.statssa.gov.za/?page_id=1854&PPN=P0307&SCH=6314> (accessed 15-07-2015).

¹³⁰ E Moore & R Govender “Marriage and Co-Habitation in South Africa: An Enriching Explanation” (2013) 44 *Journal of Comparative Family Studies* 623 623-624.

¹³¹ Various marriages under Hindu, Islamic and other religious rites are not registered.

¹³² Statistics South Africa *Marriages and Divorces 2013* 4.

¹³³ n25.

¹³⁴ See P Bakker “Chaos and the Family” (2013) 16 *PER* 116 130.

¹³⁵ Statistics South Africa *General Household Survey 2014* (27-05-2015) 36 <www.statssa.gov.za/publications/SP0318.pdf> (accessed 15-07-2015).

democratic government in 1994. The households given access are described as being “economically marginalized and have no history of saving”.¹³⁶ These properties house 12.5 million poor people, being 25% of South Africa’s population, with 56% of these subsidies awarded to woman-headed households.¹³⁷ An Urban Landmark research report indicates that 25 to 30% of all residential properties registered in the South African Deeds Registry at the time of research were products of government housing subsidies.¹³⁸ The rights of people in subsidized housing can therefore be seen as a critical national issue affecting a substantial part of the registered properties, representing many households.

To qualify for a housing subsidy applicants must either be “married or living with a long-term partner”, or, if single, must have proven financial dependents, unless elderly, a military veteran or disabled.¹³⁹ The current means threshold is a household income of less than R3 500 per month.¹⁴⁰ A further category of subsidies can be obtained for households in the R3 500 to R15 000 income bracket.¹⁴¹ No member of the household may have previously benefitted from the housing subsidy scheme (or an equivalent scheme that conferred ownership, leasehold or a deed of grant) nor should they have previously owned a fixed residential property.¹⁴² This vertical duty of the State to house the poor emanates from the Bill of Rights. Running parallel to this is the private horizontal duty of housing beneficiaries towards their needy dependents. The difference between the State’s definition of financial dependents and the legal definition based on kinship ties will be discussed further in chapter 4.

The causes of weak tenure security are discussed in chapters 5 and 6. South African

¹³⁶ Department of Human Settlements *Celebrating 20 years of Human Settlements: Bringing the Freedom Charter to Life* (2014) 4 4 and 12.

¹³⁷ 17.

¹³⁸ R Gordon, M Nell & A di Lollo *Investigation Into the Delays in Issuing Title Deeds to Beneficiaries of Housing Projects Funded by the Capital Subsidy* (2011) 24 <http://www.urbanlandmark.org.za/downloads/title_deed_delays_report_2011.pdf> (accessed 21-02-2015).

¹³⁹ Western Cape Government Website *All You Need to Know about Government Subsidies* (2015) <<http://www.westerncape.gov.za/service/all-you-need-know-about-housing-subsidies>> (accessed 24-02-2015). This official linking of unrelated financial dependents together as one household may also serve as a deterrent to formal marriage.

¹⁴⁰ Western Cape Government Website *Government Subsidies* (2015).

¹⁴¹ Western Cape Government Website <<https://www.westerncape.gov.za/service/finance-linked-individual-subsidy-programme-flisp>> (accessed 10-07-2015).

¹⁴² “Part 3: Technical and General Guidelines” in *National Housing Code 2* (2009) 12-14. Persons may however despite these criteria still qualify for a subsidy for a serviced site.

subsidized housing has (for many years) been awarded on an ownership basis, through a variety of subsidies aimed at assisting the poor. The disjunction in official records reflecting beneficiaries and occupiers is broadly recognized, although its extent and the reasons for it are contested.¹⁴³ It is nevertheless clear that many subsidized housing occupiers are no longer the official beneficiaries. Research in areas like De Noon in the Western Cape show a divergence of 39% between the occupiers and the original beneficiaries.¹⁴⁴ This is likely to be indicative of many official beneficiaries no longer holding secure tenure to any housing, and returning to shacks or backyard dwellings, or returning to a former rural homeland area.

In many of the areas showing a divergence (between occupants and State beneficiaries) registration of the original beneficiary's ownership has been delayed due to government processes.¹⁴⁵ Great uncertainty can be caused arising from changes in household structures (and personal conflicts) in the intervening years. In tandem with these delays, policy and constitutional changes surrounding gender (and in whose name title should be reflected) have undergone change. Urban migration and dual household membership further problematizes identification of household structures over time.¹⁴⁶ All of these factors complicate families' perceptions of rights to housing before and after registration of ownership. Title deeds that do not include endorsements relating to dependent's housing rights exacerbate this. This triggers substantial land information system challenges, as a secondary outcome of land administration systems for housing poverty relief. How to accurately record interests based on cohabitation and household dependency is therefore at the centre of urban subsidized housing tenure security.

¹⁴³ M Barry & LM Roux "Land Narratives and Land Registration in State-Subsidised Housing in South Africa" *Proceedings of the FIG Working Week, 17-21 May 2015, Sofia, Bulgaria* Paper 7852 (2015) <http://www.fig.net/resources/proceedings/fig_proceedings/fig2015/papers/ts06b/TS06B_barry_et_al_7852.pdf> (accessed 10-07-2015).

¹⁴⁴ Gordon et al *Delays in Issuing Title Deeds* 21.

¹⁴⁵ Gordon et al *Delays in Issuing Title Deeds* 21. The number of outstanding title deed registrations in the Western Cape has been significantly reduced, with the premier indicating a 28% backlog in 2013. Western Cape Government website *2013 State of the Province Address by Premier Helen Zille* available at <http://www.westerncape.gov.za/speech/2013-state-province-address-premier-helen-zille>, (accessed 24-02-2015).

¹⁴⁶ See D Posil & C Marx *The Interaction between Informal Land Markets and Urban-Rural Migration – Final Research Report* (2011) <http://www.urbanlandmark.org.za/downloads/land_markets_migration_2011.pdf> (accessed 21-02-2015).

The provision of largely free ownership of housing is now held to be unsustainable, with other solutions being prioritized, meaning the profile being given to titling issues is receding. Nevertheless high numbers of poor people previously acquired access to private title, with many subsidies awarded to single-headed households. This makes marital regimes that detract from tenure security for dependents relevant. Cohabiting structures that fall outside the formal record-keeping processes can negate housing gains made by the State if dependents cannot enforce rights to support due to an absence of documentary proof of dependency.

3.4 HYBRIDIZATION OF MARITAL CULTURE: ADAPTATION IN THE LIGHT OF SOCIAL CONTEXT AND ECONOMIC NEED

It is outside the scope of this thesis to analyse the cohabiting structures of couples that have no interest in entering into a formal civil marriage (either due to a desire for a formal customary marriage or the choice not to formalize their relationship). Nor can it elaborate on the clear need for courts to come to the assistance of economically weaker cohabiting partners or spouses. This thesis is limited to contracts for couples that choose civil marriage. It must still however take cognizance of the fact that marital culture is in a state of flux in South Africa. For those who choose the formal marriage route, civil marriage with a nuclear family is still accepted as normative by many couples. It cannot however be assumed that this will be true for everyone.

The shifting nature of family is extensively traversed in a 2007 Human Sciences Research Council publication¹⁴⁷ and elsewhere. Family forms are diverse. White and Asian groups show a greater likelihood of favouring the nuclear family; black African and coloured groups favour extended families; and in addition to these preferences, black African, Asian and coloured groups show a preference for multi-generational living.¹⁴⁸ Marriages in Africa may be an informal relationship construed as marriage, or formal, with a civil (secular) or religious orientation – or a combination of these.¹⁴⁹ Marriage rates are lower than the rest of sub-Saharan Africa

¹⁴⁷ AY Amoateng & TB Heaton (eds) *Families and Households in Post Apartheid South Africa: Socio-Demographic Perspectives* (2007).

¹⁴⁸ AY Amoateng, TB Heaton & I Kalule-Sabete “Living Arrangements in South Africa” in *Families and Households* 56. Multi-generational living could be financially induced in some cases

¹⁴⁹ I Kalule-Sabiti, M Palamuleni, M Makiwane & Y Amoateng “Family Formation and Dissolution Patterns” in *Families and Households* 91.

with the statistics indicating marriage is by no means universal. Suggested causes for this are women's reduced economic dependency on the institution of marriage, labour migrancy and the like, with child-bearing remaining an important "family formation event".¹⁵⁰ Religion remains an influential factor, particularly when unregistered religious marriages are added to the formal marriage figures.¹⁵¹

The choice to conclude a civil marriage can therefore be for a variety of reasons. It may for example be due to Western nuclear family norms; emerging economic stability; inability to comply with the statutory requirements for a customary marriage; the greater convenience and ease of registering a civil marriage; religious conviction, educational disadvantage resulting in ignorance of the differing marital possibilities; a desire to entrench future pension rights for a spouse; a desire for children to be recognized socially or the aim of defending permanent monogamy. Increased unmarried cohabitation can also emerge as a form of resistance, as Bank states, as a manifestation of a rejection of the values of an older generation, with "the creation of a hybrid youth cultural style that cut[s] across urban and rural values".¹⁵²

This uncertainty may be complicated by the legal parallelism of the South African statutory recognition of both customary and civil marriage, whereby two normative systems exist alongside each other as distinct models.¹⁵³ Formal parallelism of this nature is seen as "weak" legal pluralism. So-called "deep" or "strong" legal pluralism does not depend on state recognition, but is seen as accepting "all regulatory orders, including those that are generated in semi-autonomous social fields other than the state".¹⁵⁴ Marriage norms are often forged at this deeper level. As Claassens and Smythe point out in the broader customary context people "mix

¹⁵⁰ Kalule-Sabiti et al "Family Formation" in *Families and Households* 109.

¹⁵¹ Very few Muslims exercise their right to a civil marriage, preferring an unregistered Muslim marriage due to religious and cultural commitments. See W Amien "Reflections on the Recognition of African Customary Marriages in South Africa: Seeking Insights for the Recognition of Muslim Marriages" (3013) in *Marriage Land and Custom* 357 360. This may change if the current calls for legislation for religious marriage succeed.

¹⁵² L Bank "Living Together, Moving Apart: Home-made Agendas, Identity Politics and Urban-Rural Linkages in the Eastern Cape, South Africa" (2001) 19 *Journal of Contemporary African Studies* 129 136 and 138.

¹⁵³ L Mofokeng *Legal Pluralism in South Africa: Aspects of African Customary, Muslim and Hindu Family Law* (2009) 163.

¹⁵⁴ C Himonga "Taking the Gap – 'Living Law Land Grabbing' in the Context of Customary Succession Laws in Southern Africa" (2011) in H Mostert & T Bennett (eds) *Pluralism and Development: Studies in Access to Property in Africa* 114 117.

and match”, as “claims are forged at the interface between overlapping systems of law and custom which combine the ‘imported’ and the local, the formal and the informal”.¹⁵⁵ A decision of a couple in a committed permanent relationship not to marry can therefore easily be a pro-active choice in favour of the moral framework of informality. Such choices may be perceived as empowering couples to escape being imprisoned within a state matrimonial property grid.

Informal practices and norms are deeply entrenched in the approach to succession and the secondary market of subsidized housing.¹⁵⁶ This is not surprising when, as Royston notes, local practice affects tenure, with 60 per cent of housing transactions influenced by family or friends.¹⁵⁷ Despite this, recent research on poor communities in Cape Town shows kin and friendship support networks to be weak in the urban context.¹⁵⁸ Attention must be paid to cohabiting practices that take urban land disputes outside the reach of the law, short of the conflict being resolved by inaccessible legal intervention. The possibility of “norm shopping” to exploit legal pluralism for pragmatic reasons must also be considered, as this can run counter to the best interest of poor dependents. Such norm shopping could be evidenced in a decision to write a will overriding customary succession, or to marry either under the Marriage Act or the Recognition of Customary Marriages Act. Alternately it may be seen in the choice of unregistered customary marriage or informal cohabitation. The choice of a permanent unmarried life partnership (to avoid the inevitable community patrimonial consequences of marriage) could also be defined as an informal hybrid approach to matrimonial property. Cohabitation without proof of marriage undermines tenure based on a duty of support if it makes formal proof of the duty difficult.¹⁵⁹

¹⁵⁵ A Claassens & S Mnisi “Rural Women Redefining Land Rights in the Context of Living Customary Law” (2011) in B Goldblatt & K McLean (eds) *Women’s Social and Economic Rights: Developments in South Africa* 80 86 and 103.

¹⁵⁶ R McGaffin & C Wanjiko Kihato “Defining Markets: A Set of Transactions between Actors” in M Napier, S Berrisford, CW Kihato, R McGaffin & L Royston *Trading Places: Accessing Land in African Cities* (2013) 21 34-37.

¹⁵⁷ L Royston “In the Mean Time: Moving towards Secure Tenure by Recognizing Local Practice” in *Trading Places* 47 52.

¹⁵⁸ S Muyebe & J Seekings “Homeownership, Privacy and Neighbourly Relations in Poor Neighbourhoods in Cape Town, South Africa” (2012) 43 *South African Review of Sociology* 41 42 and 55.

¹⁵⁹ MJ Maluleke “Gender Equality in Customary Marriages in South Africa” in S Rohrs, D Smythe, A Hsieh & M de Souza (eds) *In Search of Equality: Women, Law and Society in Africa* (2014) 90 101.

As Mwambene and Kruuse indicate, hybridisation seems to have become an inevitable part of South African society, manifested not only in social practice but also in statutes such as in the Customary Marriages Act. They lament the fact that by incorporating some common law conventions the statute results in a hybrid type of marriage, with elements of both civil and customary law, rather than a specifically customary marriage.¹⁶⁰ In addition, the hybridizing effect of religious influence is evidenced by the fact that of those in the 1996 census who claimed to have been married by traditional rites, 69% defined themselves as Christian.¹⁶¹

Individually customized prenuptial contracts can serve as a “bottom-up” counterpoint to “top-down” formal impositions of the default in community model. The challenge is not to regress to the prior inequality of no-sharing contracts. While contracts can offer opportunities to express cultural voluntarism, the constitutional imperatives remain. A prenuptial contract can make positive use of norm shopping strategies by mixing and matching to incorporate hybrid matrimonial property practices, whether they fall on the customary-civil or the formal-informal divide. Couples in a civil marriage are also free to enter into an ancillary *lobola* agreement, should they so wish, thereby including extended familial obligations beyond the terms of the prenuptial contract.¹⁶² Bakker indicates that legally the “most apparent trend with regard to intimate relationships is the need to recognize the autonomy of persons to choose the nature of their intimate relationships and determine the consequences thereof”.¹⁶³ The poor’s autonomous freedom to contract matrimonial property consequences when they marry must be brought within this debate.

3.5 SOCIALLY EMBEDDED NORMS AND SUCCESSION RIGHTS

As Walker notes in her research on women’s property rights in South Africa, land rights are “embedded within social relationships”.¹⁶⁴ Power-relations within households are affected by social and familial ties that are often legitimized by

¹⁶⁰ L Mwambene & H Kruuse “Form over Function? The Practical Application of the Recognition of Customary Marriages Act 1998 in South Africa” in *Marriage Land and Custom* 292 295 and 299.

¹⁶¹ D Budlender, N Chobokoane & S Simelane “Marriage Patterns in South Africa: Methodological and Substantive Issues” (2004) 9 *SAJDem* 1 14.

¹⁶² Mofokeng *Legal Pluralism* 117.

¹⁶³ P Bakker “Chaos in Family Law: A Model for the Recognition of Intimate Relationships in South Africa” (2013) 16 *PER* 116 130.

¹⁶⁴ C Walker “Elusive Equality: Women, Property Rights and Land Reform in South Africa” in *Women’s Social and Economic Rights* 105 106.

repeated use and acceptance by the community (religious, customary or secular) or by a couple's worldview. Ross points to the fact that rights to subsidized housing result in debates around cohabitation and marriage, with home emerging as:

... an ongoing site of imagination, construction and contestation: a zone formed by competing and complex relationships between 'cultural narratives' and material practices.¹⁶⁵

Her Western Cape-based research indicated that an embedded understanding of "*ordentlikheid*" (decency) led to an increase in marriage when these rights are realized, with poor Afrikaans speaking residents seeing the nuclear family models as the ideal, despite their household formation seldom depicting this.¹⁶⁶

It may be that urban couples with rural backgrounds do not change their worldview as easily as they change their place of residence. Hosegood, McGrath and Moultrie note, with regard to their Kwazulu-Natal research, that marriage remains "a highly prized life-event" with income and housing affecting its timing.¹⁶⁷ Assumptions that African households are in transition to the Western form should be avoided, as Russel notes.¹⁶⁸ The Western Cape has a number of housing beneficiaries with connections to rural areas in other provinces, particularly the Eastern Cape. Cognizance must be taken of the fact that black African women, particularly rural black women, black youth and black female-headed households have been identified as particularly vulnerable to poverty.¹⁶⁹ For this reason, while this thesis cannot cover all the social issues, it is necessary to discuss at some length embedded African views of family apropos land, to take into account the effects of rapid urbanisation. The limited dataset application at the end of this chapter pays the most attention to black women, due to this greater vulnerability. A customary couple choosing a civil marriage, rather than a customary marriage, is common in rural areas and more so in

¹⁶⁵ F Ross "Model Communities and Respectable Residents? Home and Housing in a Low-income Residential Estate in the Western Cape South Africa" (2005) 31 *Journal of Southern African Studies* 631-648.

¹⁶⁶ 642-644.

¹⁶⁷ V Hosegood, N McGrath & T Moultrie "Dispensing with Marriage: Marital and Partnership Trends in Rural KwaZulu-Natal, South Africa 2000-2006" (2009) 20 *Demographic Research* 279-299.

¹⁶⁸ M Russell "Are Urban Black Families Nuclear? A Comparative Study of Black and White South African Family Norms" (2003) 29 *Social Dynamics: A Journal of African Studies* 153-168-169.

¹⁶⁹ L Chenwi & K McLean "A Woman's Home is her Castle?" – Poor Women and Housing Inadequacy in South Africa" in *Women's Social and Economic Rights* 128-141.

urban areas.¹⁷⁰ In addition, the very specific requirements of the Recognition of Customary Marriages Act can exclude many couples from use of the statute. Accordingly while the effect of African norms on land and succession will be discussed, there will not be a discussion of customary law *per se*.

Customary marriage law has been widely influenced by civil norms, some would say to its detriment. It is therefore appropriate that civil marriage prenuptial contracts should have the capacity to embrace hybridized customary influence where the couple's worldview shows such a preference. Implicit in this is that African approaches should not be patronized as less developed than Western forms, or less capable of developing in accordance with constitutional principles. It is inevitable that embedded customary norms, such as the view that land does not belong to people, but people belong to land, will be drawn into the marital relationship of couples with this background. Rights of access, use and disposal may therefore be informed by communitarian values, with family connectedness as the primary indicator for inclusion.¹⁷¹ The word "rights" is used loosely here, with inclusion based on relationships and belonging, not on the Western rights approach.

African normative views are themselves in a state of flux and development, as recent research and case law on the living law shows.¹⁷² Nevertheless, in the African conceptualisation, as extensively explored in Claassens and Smythe's 2013 *Marriage Land and Custom*, land is seen as being managed by a person in a custodian manner.¹⁷³ This guardianship on behalf of the family group is not readily reconcilable with the (Western) individual private ownership paradigm. Access to land is dependent on belonging, active participation and need, not due to rights that are claimed as a result of legal rules. In this frame extended family, particularly the elderly and siblings, have far greater prominence than in Western models, with the elected custodian expected to take up the broader duty of support according to family

¹⁷⁰ V Hosegood "Women, Marriage and Domestic Arrangements in Rural Kwa-Zulu Natal, South Africa" in *Marriage Land and Custom* 143 149 and 152; D Budlender "Women, Marriage and Land: Findings from a Three Site Survey" in *Marriage Land and Custom* 28 37.

¹⁷¹ Walker "Elusive Equality" in *Women's Social and Economic Rights* 108.

¹⁷² See W Wicomb "Securing Women's Customary Rights in Land: the Fallacy of Institutional Recognition" in *Marriage Land and Custom* 49-72; C Himonga "Taking the Gap – 'Living Law Land Grabbing' in the Context of Customary Succession Laws in Southern Africa" in *Pluralism and Development* 114-139.

¹⁷³ See Table 3 63 below.

inclusion norms. Inclusion usually follows the patrilineal line, with married women and children becoming the responsibility of the husband's family. Some customs follow the matrilineal line. Single women and their children remain the responsibility of the family of their birth. Succession is seen as something to be determined by the surviving family, according to family need and norms of inclusion, not by individual testation.¹⁷⁴ Decision-making structures are largely patriarchal, with women being consulted, but subordinate, although current research on the living law is showing natural progression towards constitutional values.

This worldview is discussed by the Constitutional Court in the *Bhe* case, with constitutional principles identified.¹⁷⁵ Nevertheless, it must be remembered that informal practices often occur precisely when local norms differ from the formal legal norms. While the Western Cape is the only province that does not have any "traditional dwelling" housing, the Eastern Cape has the highest percentage of traditional dwellings in the country.¹⁷⁶ The Western Cape also has the second highest rate of inter-provincial incoming migration, with the Eastern Cape having the highest outgoing migration.¹⁷⁷ This is a factor regularly evidenced in the number of housing beneficiaries in the Western Cape originally from the Eastern Cape. Traditional normative notions of cohabiting dwelling arrangements are therefore highly relevant to subsidized housing issues in the Western Cape.

As a counterpoint to these more traditional patriarchal family structures, female-headed households are of increasing social significance, with their own embedded norms, based on a likely matrifocal orientation. Some perceive this is due to a need for poor women to avoid "inadequate providers, heavy drinkers, and wife beaters" in a society where child bearing outside marriage is increasingly accepted and couples

¹⁷⁴ See Dataset 1 of Table 3 63 below.

¹⁷⁵ See *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *SA Human Rights Commission v President of the RSA* 2005 1 BCLR 1 (CC). The case at times rejects the customary worldview, to the extent that the "official" customary approach does not necessarily reflect current practice (eg in practice the eldest male does not always actually look after the extended family). Those elements of "official" customary law that are unconstitutional on the grounds of gender inequality, or affront to dignity, are also rejected.

¹⁷⁶ Statistics South Africa *General Household Survey 2014* (27-05-2015) 35
<http://www.statssa.gov.za/publications/P0318/P03182014.pdf> (accessed 25-07-2015).

¹⁷⁷ Statistics South Africa *Census 2011: Provinces at a Glance* (2011) 20
http://beta2.statssa.gov.za/census/census_2011/census_products/Provinces%20at%20a%20glance%2016%20Nov%202012%20corrected.pdf (accessed 21-02-2015).

are viewed as needing to establish themselves economically before marrying.¹⁷⁸ Urban black couples are three times less likely than white couples to cohabit, with increased cohabitation linked to pressure for access to housing.¹⁷⁹ Female powers of decision-making, autonomy and control must be capable of protection if constitutional principles of equality are to be maintained. The same must apply to vulnerable men to avoid discrimination due to gender. While both Western rule-based models and African inclusive models can protect family members (when applied normatively) all models often dysfunction in the context of poverty.

The above summary of embedded norms merely raises broad issues and is by no means exhaustive. The *White Paper on Families in South Africa 2012* distinguishes between family and households and discusses marriage, cohabitation, single-parent households, women-headed households, skip-generation households (where grandparents raise grandchildren without parents present), child-headed households, same-sex relationships, polygynous and migrant families.¹⁸⁰ Each of these types will have distinctive needs.

3.6 SOCIAL ISSUES RAISED IN LIMITED DATASETS

Subsets of social issues will now be collated from a limited dataset of three recent collections of articles, to place the process of identification of social issues within current academic thinking.¹⁸¹ The subsets of social issues will aim to highlight particular relationships between landholders, dependents and land. As discussed in the discussion on methodology in chapter 2, this list of issues is of necessity contingent. Not all references to the issues in the dataset have been cross-referenced. Only a representative spread of references has been given, with many of the issues being discussed again elsewhere in the limited dataset. Social issues triggered by ownership registration complexities have not been included. The social issues are described in Table 2 below, numbered (a) through to (qq). The Table 3 datasets reference the source of issues (a) to (qq).

¹⁷⁸ E Moore & R Govender (2013) 44 *Journal of Comparative Family Studies* 623 625-6.

¹⁷⁹ 632 and 635.

¹⁸⁰ Department of Social Development *White Paper on Families in South Africa 2012* 11-22.

¹⁸¹ Limited references will also be made in the latter dataset to Mofokeng's *Legal Pluralism in South Africa: Aspects of African Customary, Muslim and Hindu Family Law* (2009).

TABLE 2

LIST OF SOCIAL ISSUES IN DATASETS 1, 2 AND 3	
Proving the existence of prior unregistered customary or religious marriages may be problematic, particularly since customary marriage is a process, not a once-off ceremony	a
Economic constraints may have prevented a prior marriage	b
It is often unclear whether a prior marriage has terminated in the instance of customary marriages that break down	c
Customary wives or wives married by religious rites, prior to the partnership under consideration, may be abandoned	d
A first wife's consent to a second polygynous marriage may be seen as unnecessary	e
A subsequent wife may be unaware of a prior wife, or may be complicit in wishing not to recognize prior unregistered wives	f
Normative confusion (or opposition) can be caused by exposure to both rural communitarian rights and urban individual rights	g
Lawyers are often either ignorant of current customary law or only competent in a formalistic way	h
Past practices favoured registering property in the name of a male alone, despite his having a wife or an adult co-habiting dependent, resulting in men feeling they have sole decision-making rights	i
Co-ownership rights often do not assist with a power imbalance within the home	j
There can be resistance to (or problems with) obtaining necessary government documentation - low literacy and education levels require additional explanations	k
There is a loss of rights due to non-registration of marriage, estates and ownership transfer	l
There is a need to recognize differences between women and men and treat them in context. Gender often creates unequal power relations for women within marriage. Men may also be vulnerable, particularly younger brothers and male children	m
New cohabiting parties or extended family may claim property where a previous cohabiting party and their dependents were named as the dependents. "Family" in the customary context implies extended family, with marriage creating rights and obligations to the family and clan, not just between spouses	n
The registration process for children of unregistered customary marriages in the mother's name makes proof of dependency difficult	o
Household structures and marriage forms offering rights to support are changing. This makes identification of duties of support harder to ascertain	p
African norms see property as communitarian with the custodian's duty of support prioritized on grounds of birth or marriage contrary to individualistic ownership	q
The past registrations in the names of men alone, before the new gendered approaches, resulted in a loss of bargaining power for women within their households. Female-headed households are still more likely to be the poorest of the poor	r
Patriarchal norms that see women as subordinate discriminate against women, the young, the aged and the poor	s
De facto dependents are not necessarily the same as formally recognized dependents	t
Customary norms about the duty of support are usually patrilineal	u
Women are vulnerable to forced eviction during marriage and after its termination	v
Sisters, widows, stepmothers, younger brothers, grandparents and children are treated differently depending on familial norms	w
A testator may exclude dependents in a will, leaving them vulnerable	x
The customary norm is that succession relates to identifying the representative of the living family, not identifying an owner with exclusive rights. The living family are seen as determining succession, not the spouses	y
Customary norms are usually against women inheriting land	z
Property grabbing by relatives after the death of a spouse is common	aa
There is a need to protect children-headed households and ensure children are able to access their right to be involved in decisions about themselves / defend their rights in accordance with recent statutory provisions	bb
Unmarried women, certain married women, widowed women and women without children may be discriminated against	cc
Processes to secure duties of support and maintenance may not be activated in time for dependents to secure their rights in property	dd
Differing norms can lead to disagreement regarding whether dependents should inherit according to need or equally	ee
Couples may disagree whether inheritance should follow the patrilineal or matrilineal line, or follow the caregivers. The future support of dependents may be seen normatively as either the duty of the husband's family or the wife's natal family	ff
The inheritance rights of those dependent on people diagnosed with late symptoms of HIV/AIDS are often harder to protect	gg
Many women function within a normative structure where they are subordinate and it is accepted that male siblings and relatives should be the decision-makers	hh
Women are vulnerable when there are disputes after a death, abandonment or divorce. Many women are either unwilling or not able to appropriate legal rights and remedies	ii
Women are exposed to domestic violence and may have to stay in an abusive relationship for shelter	jj
Customary forums have varying capacities to resolve conflict	kk
Civil courts are weak at encompassing relational and embedded interests within the formal rights paradigm. Informal justice approaches then occur	ll
Communitarian views conflict with adversarial litigious approaches	mm
Courts are more expensive than private dispute resolution	nn
Family is often expected to resolve conflict, with male arbiters making decisions. Lobolo negotiations may include implicit understanding of who mediate for marital disputes	oo
Forum shopping may be used by the more empowered to advance rights	pp
There is a need to create space for negotiation and the flexibility to cope with changing circumstances	qq

TABLE 3

DATASET 1		A Claassens & D Smythe (eds) <i>Marriage Land and Custom: Essays on Law and Social Change in South Africa</i> (2013)	
AUTHOR	PAGE	ARTICLE TITLE	SOCIAL ISSUE
Claassens A & Smythe D	1- 27	Marriage, land and custom: What's law got to do with it?	(s) 25 (z) 11 (cc) 25
Budlender D	28-48	Women, marriage and land: Findings from a three-site survey	(s) 32, 44-45 (v) 47 (cc) 32, 45 (ff) 38 (hh) 44-45 (ii) 47
Wicomb W	49-72	Securing women's customary rights in land: the fallacy of institutional recognition	(qq) 57
Cousins B	73-99	Women's land rights and social change in rural South Africa: the case of Msinga, KwaZulu Natal	(a) 86 (c) 95 (p) 75 (s) 90 (u) 82-83 (aa) 90 (cc) 90 (ff) 90 (hh) 90 (oo) 89 (qq) 78-79
Weinberg T	100-117	Contesting customary law in the Eastern Cape: gender, place and land tenure	(qq) 116
Mnisi WS	118-142	Women's eviction in Msinga: the uncertainties of seeking justice	(k) 126, (v) 118-119 (ii) 118, 130
Hosegood V	143-168	Women, marriage and domestic arrangements in rural KwaZulu-Natal, South Africa	(a) 154 (c) 148, 159 (d) 159 (g) 165 (n) 154 (p) 147, 149 (qq) 165
Posel D & Rudwick S	169-180	Changing patterns of marriage and co-habitation in South Africa	(b) 175, 179
Mhongo C & Budlender D	181-196	Declining rates of marriage in South Africa: what do the numbers and analysts say?	(b) 188,193
Dubbeld B	197-217	How social security becomes social insecurity: fluid households, crisis talk and the value of grants in a KwaZulu-Natal village	(p) 200
Cooper D Moore E & Mantell J	218-238	Renegotiating intimate relationships with men: how HIV shapes attitudes and experiences of marriage for South African women living with HIV: 'Now in my life, everything I do, looking at my health'	(gg) 238
De Souza M	239-272	When non-registration becomes non-recognition: examining the law and practice of customary marriage registration in South Africa	(d) 246, 255 (e) 257-258 (f) 246, 255 (k) 248 (l) 269 (o) 247 (u) 248 (aa) 248 (ff) 248 (nn) 270
Kovacs R, Ndashe S & Williams J	273-291	Twelve years later: how the Recognition of Customary Marriages Act of 1998 is failing women in South Africa	(a) 277, 278
Mwambene L & Kruuse H	292-317	Form over function? The practical application of the Recognition of Customary Marriages Act 1998 in South Africa	(a) 297 (l) 299, 301 (p) 297 (q) 298 (nn) 317
Himonga C & Pope A	318-338	Mayelane v Ngwenyama and Minister for Home Affairs: a reflection on wider implications	(a) 333 (c) 332 (f) 333
Amien W	357-384	Reflections on the recognition of African customary marriages in South Africa: seeking insights for the recognition of Muslim marriages	(m) 384

TABLE 3: DATASETS 2 AND 3

DATASET 2: B Goldblatt & K McLean (eds) <i>Women's Social and Economic Rights: Developments in South Africa</i> (2011)			
AUTHOR	PAGE	ARTICLE TITLE	SOCIAL ISSUE
Fredman S	4-33	Engendering social and economic rights	(i) 9 (k) 26 (m) 15 (s) 13, 27 (z) 9, 26 (hh) 8, 13, 28
Goldblatt B	34-57	The right to social security – addressing women's poverty and disadvantage	(p) 55 (q) 37 (t) 46 (ff) 55 (ii) 38 (mm) 37
Skelton A	58-79	Girls' social and economic rights in South Africa	(z) 65 (aa) 76 (bb) 77, 79
Claassens A & Mnisi SW	80-104	Rural women redefining land rights in the context of living customary law	(p) 89 (s) 90, 95 (v) 90 (cc) 81 (ee) 89 (hh) 90, 95 (kk) 89
Walker C	105-127	Elusive equality: Women, property rights and land reform in South Africa	(d) 117 (m) 115-6, 118, 126 (p) 113 (q) 108, 127 (r) 107, 114 (s) 117, 121 (ff) 115 (gg) 113 (hh) 118, 121 (ii) 117, (mm) 116
Chenwi L & McLean K	128-155	A woman's home is her castle? – Poor women and housing inadequacy in South Africa	(i) 143 (j) 142-143 (n) 143 (p) 125, 142, 153 (q) 139 (r) 141, 143-144 (v) 129, 136, 145, 148 (z) 143 (hh) 154 (jj) 147
Veriava F	224-244	Gender equality and education in South Africa	(k) 224
			(r) 249
DATASET 3: H Mostert & T Bennett (eds) <i>Pluralism and Development: Studies in Access to Property in Africa</i> (2011); L Mofokeng <i>Legal Pluralism in South Africa: Aspects of African Customary, Muslim and Hindu Family Law</i> (2009)			
AUTHOR	PAGE	ARTICLE TITLE	SOCIAL ISSUE
Bennett T & Mostert H	1-22	Access to property in Africa: An introductory survey	(q) 19
Woodman G	35-58	Legal pluralism in Africa: The implications of state recognition of customary laws illustrated from the field of land law	(h) 47, 58 (q) 44, 57 (x) 57 (kk) 56
Griffiths A	83-113	The changing dynamics of customary land tenure: Women's access to and control over land in Botswana	(ll) 84
Himonga C	114-139	Taking the gap – 'Living law land grabbing' in the context of customary succession laws in Southern Africa	(q) 118, 121, 124 (u) 122 (v) 132 (w) 132, 137 (y) 123, 127 (z) 122 (aa) 116, 121, 129, 131 (ee) 130 (ll) 115 (qq) 123, 138
Mnisi SW	140-173	Securing women's property inheritance in the context of plurality: Negotiations of law and authority in Mbuzini customary courts and beyond	(g) 167 (l) 166 (p) 153 (t) 153 (w) 165 (y) 154 (ee) 153 (kk) 143, 165 (pp) 172 (qq) 155
Claassens A	174-209	Contested power and Apartheid tribal boundaries: the implication of 'living customary law' for indigenous accountability mechanisms	(g) 176 (k) 204 (v) 206 (w) 192, 196, 206 (x) 204 (y) 205-206 (dd) 196, 205 (hh) 185 (kk) 191, 193 (nn) 193 (pp) 191
Kingwill R	210-237	Lost in translation: Family title in Fingo village, Grahamstown, Eastern Cape	(l) 211, 223, 225, 236 (p) 216 (v) 219-220, 229 (x) 218, 234 (y) 215, 233 (ff) 50-51, 122, 125 (ff) 230 (oo) 130, 213, 225, 323 (qq) 223, 226
Pienaar G	238-271	Land information as a tool for effective land administration and development	(g) 254 (l) 242
Pope A	308-333	Indigenous-law land rights: Constitutional imperatives and proprietary paradoxes	(y) 327 (cc) 324
Mofokeng L	Book	Legal Pluralism in South Africa: Aspects of African customary, Muslim and Hindu family law (2009)	(a) 63-75 (n) 5 (q) 77 (bb) 107-8 (oo) 52, 53.

3.7 CONCLUSION

This chapter has attempted to give both a microscopic and a macroscopic view of the social context of housing conflicts and tenure insecurity affecting State-subsidized housing. Chapters 4 and 5 will deal with the legal framework and the land tenure debate. Chapter 6 will use the subsets of social issues identified in Table 2 to drive the design of a model for a pro-poor prenuptial agreement.

The *White Paper on Families* notes that families founded upon “stable marital unions provide significant economic and psychosocial benefits for men, women and children”.¹⁸² It adds that government must provide “preventive relationship support at key points in couples’ relationships to mitigate the substantial costs upon individuals and society often brought about by the breakdown of stable marital structures”.¹⁸³ Pro-poor prenuptial agreements entered into prior to marriage could be a key point at which to foster this stability.

¹⁸² Department of Social Development *White Paper on Families in South Africa 2012* 39 with reference to Wilkins.

¹⁸³ 39.

CHAPTER 4
FORMAL LEGAL FRAMEWORK:
THE LAW OF MARRIAGE AND COHABITATION

Note to the reader/viewer

This art image has been removed pending copyright approval.

To view the image on the internet please use:

The artist's name: "Auguste Rodin"

and

The title of the painting: "The Kiss"

In this thesis the image of "The Kiss" is superimposed over a
Surveyor General diagram of a land parcel with the street names
"Consolidation Close" and "Consummation Avenue"

THE KISS

Auguste Rodin

1882-1889

4 LEGAL FRAMEWORK: THE LAW OF MARRIAGE AND COHABITATION

The capacity to choose to get married enhances the liberty, the autonomy and the dignity of a couple committed for life to each other. It offers them the option of entering an honourable and profound estate that is adorned with legal and social recognition, rewarded with many privileges and secured by many automatic obligations.

*Fourie v Minister of Home Affairs*¹⁸⁴

4.1 INTRODUCTION

The poor who own land often acquire it after years on government waiting lists and various means tests and processes to confirm dependents. They are given housing because they and the dependents listed on the application were in need of it. More than three million South Africans cohabit outside of marriage.¹⁸⁵ This constitutes a very large class of South Africans who may potentially wish to marry. Between a quarter and a third of South Africa's residential properties are previously subsidized. This means that the housing rights of a very large class of housing beneficiaries and their dependents are at stake when a beneficiary marries. Rodin's image of *The Kiss* above is to focus the mind on the legal complexities of individual ownership and possession in the context of intimate relationships. It is superimposed over a diagram for a consolidated land parcel to allow the reader to reflect on relationships as a route to the vesting of land rights and securing tenure.

In this chapter an overview will be given of the South African legal framework that serves as a backdrop to the thesis topic. The chapter will open with a discussion of the sources of the formal law, followed by the law relating to marriage, cohabitation

¹⁸⁴ Cameron JA 2005 3 SA 429 (SCA) para 14.

¹⁸⁵ n25 and n26.

and duties of support. Some statutes relating to customary law will be included, despite customary marriage contracts being outside the thesis scope, due to hybridization issues, as discussed in chapter 3. Discussing the sources of informal and extra-legal “rights” is outside of the thesis scope; they are as varied and complex as the sources of the formal law. They are however relevant to the thesis, so some tenure aspects will be discussed in chapter 5.

4.2 FICTIONAL LIFE STORY

Since the methodology of this thesis includes the use of fictional life stories, a story will now be narrated to contextualize the legal framework that follows: A single mother of two children is awarded a housing subsidy and obtains sole title. She is a model citizen; working hard, supporting her two children (eight and three years of age) paying her municipal bills and just managing to keep her head above water financially. She falls in love and decides to marry, resulting in a marriage in community of property. Due to her not having the economic freedom necessary to enter into a prenuptial contract, her husband automatically acquires a half share in the house. The marriage breaks up rapidly after the wife discovers her husband accumulated considerable debt before the marriage, does not wish to work and is directing his creditors to her door. With the benefit of hindsight, she feels that all poor landowners (for whom security of tenure is critical) should realize there is no free choice open to them, other than marrying and taking on the risk of sharing debts and assets, or not marrying to avoiding this risk. She also realizes that she has entirely failed to protect her children’s rights to her house.

Matrimony has an element of risk. As the story shows, it is no small thing for a poor person to commit to the loss of autonomous control of home ownership, as well as the potential assumption of responsibility for a spouse’s pre- and post-marital debts.

4.3 SOURCES OF THE FORMAL LAW

The binding sources of law within South Africa are the Constitution, legislation (also described as statutes and acts), judicial precedent (also described as case law), the common law and customary law (also described as indigenous law) and custom.

The Constitution of the Republic of South Africa, 1996 has precedence over all law. This authority is followed by other legislation (unless disapproved by the Constitutional Court) and then by judicial precedent. The authority of judicial precedents is also ranked, with the Constitutional Court supreme, then the Supreme Court of Appeal and then the provincial high courts. The common law must be looked to in the absence of legislation and is adapted by the Constitution, legislation and judicial precedent. While often used synonymously with the Roman-Dutch Law, the term common law is also used for other purposes, such as to refer to the law applicable to the whole country, as opposed to laws that only apply to certain groups, like customary law.¹⁸⁶ Customary law was in the past regarded as a lesser form of law, but from the commencement of the Constitution in 1997 it has equal weight with the common law. It is adapted by the “living law” (the adjusted rules applied in African communities to accommodate change) as well as by the Constitution, legislation and case law. Other legal sources such as foreign law and legal textbooks are not binding law, but are regarded as persuasive.

4.4 LEGAL FRAME FOR MARRIAGE AND COHABITATION

4.4.1 CONSTITUTIONS

4.4.1.1 Constitution of the Republic of South Africa, 1996

The Constitution is the supreme law of the Republic of South Africa (The Constitution of the Republic of South Africa, 1996.¹⁸⁷ Section 2 provides that “law and conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled.” Accordingly any legal inquiry must always begin with the Constitution. The rights in the Bill of Rights chapter of the Constitution “may only be limited by a law of general application in a reasonable and justifiable manner”.¹⁸⁸ The test to decide whether a limitation is reasonable and justifiable is whether the limitation fulfils the requirements of dignity, equality and freedom in an “open and democratic society”. The Bill of Rights is binding upon the legislature, the executive, the

¹⁸⁶ Hutchinson D (ed) *Wille's Principles of South African Law* 8 ed (1991) 4.

¹⁸⁷ The Constitution 1996.

¹⁸⁸ S 36.

judiciary, all organs of state and all persons.¹⁸⁹ The common law and customary law must also be interpreted in accordance with the Bill of Rights and developed to comply with it in instances where it does not. The most important provisions in the Bill of Rights relevant to marriage are the right to equality, the right to dignity, the right to bodily and psychological integrity, the right to freedom of religion, belief and opinion, the right to property, children's rights and the right to culture.¹⁹⁰

The right to dignity provides that everyone has inherent dignity and the right to have it "respected and protected".¹⁹¹ The right to equality provides that everyone "has the right to equal protection and benefit of the law".¹⁹² The equality provision prohibits direct or indirect discrimination by the State, or any person against anyone, on the grounds of marital status, if such discrimination is shown to be unfair.¹⁹³ The non-discrimination clause covers all kinds of discrimination, with a range of cases particularly relevant to the context of marriage. There is also protective legislation, with marital status defined as including persons who are "single, married, divorced, widowed or in a relationship, whether with a person of the same or the opposite sex, involving a commitment to reciprocal support in a relationship".¹⁹⁴ Other equality categories relevant to marital status are gender, sexual orientation, religion, conscience, belief and culture.

The right to freedom of religion, belief and opinion is further entrenched by the right to create legislation recognising "marriages concluded under any tradition, or a system of religious, personal or family law; or systems of personal and family law under any tradition, or adhered to by persons professing a particular religion".¹⁹⁵ Such recognition must however be consistent with the other provisions of the Constitution. Children's rights are also entrenched in the Bill of Rights, which provides that every child under 18 years has the right "to family care or parental care, or to appropriate alternative care when removed from the family environment" and

¹⁸⁹ S 8.

¹⁹⁰ Ss 9, 10, 12(2), 15, 25, 28 and 30.

¹⁹¹ S 10.

¹⁹² S 9.

¹⁹³ S 9(3).

¹⁹⁴ S1 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

¹⁹⁵ S15(3) the Constitution.

“to basic nutrition, shelter, health care services and social services”.¹⁹⁶ In every matter concerning a child, the child’s best interest must be paramount.¹⁹⁷

Further Bill of Rights provisions of relevance to this thesis are s 25 and 26. The property right in s 25(1) prohibits any law permitting “arbitrary deprivation of property”. The housing right in s 26 provides for a right “to have access to adequate housing”, while placing a duty on the State to work towards the “progressive realization of this right”. The section includes the provision that no one may be evicted without a court order (after considering all the circumstances) and disallows legislation that permits “arbitrary eviction”.

4.4.1.2 The Constitution of the Western Cape 1997

The national Constitution provides for the adoption of a provincial constitution.¹⁹⁸ Provincial constitutions may include some differing provisions, but may not be inconsistent with the national Constitution. Schedule 4 of the national Constitution provides that a province has concurrent competence to legislate on matters concerning housing. This thesis addresses pro-poor prenuptial agreements in the context of subsidized housing in the Western Cape and will undertake focus groups in municipalities in the Western Cape. This makes the Western Cape Constitution of particular relevance.

The Western Cape provincial constitution came into effect in 1998.¹⁹⁹ Its directive principles for provincial policy include both the promotion and maintenance of a market-orientated economy and the right of access to adequate housing.²⁰⁰ These two concepts are often irreconcilable in the context of poverty. After an initial moratorium on sales housing beneficiaries are free to sell their house in the free market.²⁰¹ The right of an individual title deed holder to sell is often at odds with

¹⁹⁶ S 28(1).

¹⁹⁷ S 9 Children’s Act 38 of 2005.

¹⁹⁸ S 142 the Constitution.

¹⁹⁹ Constitution of the Western Cape 1997, 1 of 1998.

²⁰⁰ Ss 81(g) and (h)(i).

²⁰¹ S 10A and 10B Housing Act 107 of 1997.

other family member's rights to the housing. This raises conflicts of interest as complex as the right to patriarchal custom versus gender equality.

The preamble of the Western Cape Constitution differs from that of the national Constitution. Amongst the differences is the specific inclusion of "the recognition of the family" and the "rule of law". A commitment to the rule of law may be presumed in the national Constitution. The term "family" is no longer legally understood in narrowly nuclear terms. The specific mention of family in the preamble of the Western Cape Constitution gives an added impetus to the need for family law to address areas of vulnerability and dependence in intimate relationships. When the poor cannot afford formal contractual and litigation processes they are inevitably pushed outside of the ambit of the rule of law into self-regulation.²⁰² Increasingly beneficiaries of State subsidized houses are developing their own informal rules to cope with the malfunctioning of the formal law in their context. The Western Cape would be free to enact legislation covering some of the issues discussed in this thesis, making the principle of recognition of the family pertinent.

4.4.2 MARRIAGE LEGISLATION

There are currently three statutes governing the form of marriage, namely the Marriage Act,²⁰³ the Customary Marriages Act²⁰⁴ and the Civil Union Act.²⁰⁵ Couples must choose under which Act they wish to marry. While all three Acts apply to monogamous heterosexual relationships, the Customary Marriages Act is the only Act that includes polygynous relationships and the Civil Union Act is the only Act that includes same-sex relationships. A monogamous couple married under customary law is free to re-marry each other under civil law.²⁰⁶ This has the consequence that the customary marriage is transformed into a civil marriage in the

²⁰² The "rule of law" is used by the researcher as including its horizontal application, in accordance with the World Bank's definition as "the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, the police, and the courts, as well as the likelihood of crime and violence" D Kaufmann, A Kraay & M Mastruzzi *Governance Matters VIII Aggregate and Individual Governance Indicators 1996–2008* (World Bank Policy Research Working Paper 4978) (2008) 6 <<http://ssrn.com/abstract=1424591>> (accessed 30-04-2015).

²⁰³ Act 25 of 1961.

²⁰⁴ Act 120 of 1998.

²⁰⁵ Act 17 of 2006.

²⁰⁶ S 10(1) Act 120 of 1998.

eyes of the law. This is the only context in which a couple may remarry under another statute without first divorcing. In all other cases it will be unlawful. Foreign matrimonial property law applies when husbands have a foreign domicile at the time of marriage. Further legislation for marriages under other traditions, such as Muslim marriages, although under consideration, is not yet available.

4.4.2.1 The Marriage Act 25 of 1961

The Marriage Act deals with the appointment of civil marriage officers and the solemnization of civil marriages.²⁰⁷ While it is an offence to knowingly solemnize an unauthorized marriage, it is not an offence to solemnize a religious marriage that does not purport to be a valid civil marriage.²⁰⁸ Ministers who minister according to “Christian, Jewish, or Mohammedan rites or the rites of any Indian religion” can however be designated as civil marriage officers, in addition to the marriage officers who hold public office, such as magistrates.²⁰⁹ The matrimonial property of couples marrying under the Marriage Act and the Civil Union Act is subject to the Matrimonial Property Act.

4.4.2.2 The Recognition of Customary Marriages Act 120 of 1998

The Recognition of Customary Marriages Act provides for the recognition of customary marriages and specifies the requirements for validity, registration, status and capacity of spouses, as well as the proprietary consequences and dissolution. Prior to this Act these marriages were not fully recognized as marriage, having less protection as customary unions. This Act commenced in 2000 and recognizes all existing customary marriages that complied with customary law as valid, with marriages after the Act needing to comply with the Act in order to be valid.²¹⁰

A customary marriage is a marriage according to customary law, which is defined as “customs and usages traditionally observed among South Africa’s indigenous

²⁰⁷ Ss 2-9 and 12 Act 25 of 1961.

²⁰⁸ S 11.

²⁰⁹ S 3(1).

²¹⁰ S 2 Act 120 of 1998.

peoples and which form part of the culture of those peoples”.²¹¹ Both members of the couple must be over 18, agree to marry under customary law and their marriage must be “negotiated and entered into or celebrated” by customary law.²¹² Customary marriages may be polygynous or monogamous. There are no officiating marriage officers and for registration, registering officers must be satisfied that the marriage exists.²¹³ There is a high incidence of unregistered African customary marriages in South Africa.²¹⁴ The Act provides that if a customary marriage is not registered the lack of registration does not affect the validity of the marriage.²¹⁵

4.4.2.3 *The Civil Union Act 17 of 2006*

The Civil Union Act commenced in 2006 and provides for civil unions by either marriage or civil partnership.²¹⁶ Civil unions can be entered into by both same-sex and heterosexual couples. Officiating marriage officers who are public officials are appointed according to the Marriage Act. Ministers of a religious community must apply separately under the Civil Union Act for appointment.²¹⁷ The section 1 definition whereby a marriage under this Act is described as a “civil union” is contentious. For the sake of brevity in this thesis “civil marriage” means marriages under both the Marriage Act and the Civil Union Act. All three of these forms share the same patrimonial consequences relevant to prenuptial agreements.²¹⁸

4.4.3 MATRIMONIAL PROPERTY LEGISLATION

Prior to the commencement of the Matrimonial Property Act 88 of 1984 civil marriages were either in community of property or out of community of property as a result of the registration of a prenuptial contract (referred to in the Act as an “ante-nuptial” contract). Theoretically couples could construct an alternative property

²¹¹ S 1.

²¹² S 3(1).

²¹³ S 4(4)(a).

²¹⁴ R Kovacs, S Ndashe & J Williams “Twelve Years Later: How the Recognition of Customary Marriages Act of 1998 is Failing Women in South Africa” in A Claassens, D Smythe & G Bradfield (eds) *Marriage Land and Custom: Essays on Law and Social Change in South Africa* (2013) 273 278.

²¹⁵ S 4(9) Act 120 of 1998.

²¹⁶ S 2 Act 17 of 2006.

²¹⁷ S 5.

²¹⁸ S 13.

regime in their prenuptial contract, but this was rare with a standard no-sharing contract being the norm.²¹⁹ With the inception of the Matrimonial Property Act a third type of marital system came into being, namely out of community of property with accrual. This overview will focus on the current law for people who wish to marry in the future.

4.4.3.1 *Marriage In Community of Property and of Profit and Loss*

The default common law in community of property is the first and most common form of marriage, described colloquially as “what is mine is yours and what is yours is mine.” Spouses become co-owners of property owned before and after marriage in undivided and indivisible half shares. This means that the spouses share all their income and assets, whether owned by one of the spouses before the marriage, or whether obtained during the marriage. Debts and liabilities are also shared and the spouses become jointly liable for them. The spouses are accordingly co-owners in equal shares of their property and are jointly liable for all debts, whether acquired before the marriage or not. However, donations or an inheritance where the giver states that it should not fall into a joint estate will become the separate property of a spouse. There are also some other statutory exceptions that exclude property from a joint estate. In the case of insolvency all assets in a joint estate fall into the insolvent estate. When marriage is referred to in general terms as “marriage in community of property” community of profit and loss is implied.²²⁰

The Recognition of Customary Marriages Act legislated distinguishable terms for existing customary marriages.²²¹ All monogamous marriages after commencement of the Act are in community of property unless a prenuptial contract is entered into.²²² Historically customary marriage was seen as a bond between families, not between individual spouses, such that the Western in- and out- of community of property systems did not easily apply. The Constitutional Court has now held in the *Gumede case* that s 7(1) of the Recognition of Customary Marriages Act is unconstitutional in distinguishing between monogamous marriages before and after

²¹⁹ Hutchinson *Wille's Principles* 116.

²²⁰ For a more detailed overview see J Heaton *South African Family Law* 3 ed (2010).

²²¹ S 7(1) Act 120 of 1998.

²²² S 7(2).

the Act.²²³ Subsequent to this case all monogamous marriages are in community of property unless there is a prenuptial contract.

4.4.3.2 *Marriage Out of Community of Property*

Agreements regulating a marriage out of community of property follow the usual requirements for valid contracts under contract law and can take a number of forms. There are additional requirements for prenuptial contracts and they must be by means of a notarial deed, executed by a notary and registered at the Deeds Office.²²⁴ One form of prenuptial agreement is marriage totally out of community of property with a complete separation of the spouses' estates. Another is marriage out of community of property with accrual, as legislated in the Matrimonial Property Act. This has now become the most common form, although the complete no-sharing separation of estates is still possible. The Recognition of Customary Marriages Act is silent on the matrimonial property regime of polygynous marriages.²²⁵

Couples entering into prenuptial agreements have the freedom to contract in accordance with their mutual legal intentions (subject to a few restrictions) and marriage agreements often incorporate hybrid terms.²²⁶ Since this is the area into which this thesis will speak, such prenuptial contracts will not be categorized as one category, but as additional, distinct categories. The first additional category is common in legal practice, particularly with older, wealthier clients. It will be defined as "marriages out of community of property with client-specific terms". The other category is entirely new and distinctive to this thesis. It will be defined as "out of community of property with accrual, subject to a pro-poor prenuptial agreement".

Complete Separation of Property

Marriages totally out of community of property are colloquially described as "what is his is his and what is hers is hers". In such cases the prenuptial contract must fully

²²³ *Gumede v President of Republic of South Africa* 2009 3 BCLR 243 (CC).

²²⁴ FE Van der Merwe *Notarial Practice* (2001) 81.

²²⁵ S 7(6) Recognition of Customary Marriages Act 120 of 1998.

²²⁶ A couple may not include terms that conflict with the "essence of marriage" that are against the public morals.

exclude the default in community of property system and the accrual system.²²⁷ The spouses retain their own income and assets. Community of profit and loss is also excluded. Each spouse retains ownership of property acquired by them prior to the marriage and during the marriage, as well as sole responsibility for any losses and debts incurred by them. Such contracts are also referred to as “no-sharing” contracts.

With Accrual

The accrual system was brought into being due to the recognition that women who entered into these contracts were often disadvantaged on death or divorce, particularly due to the many sacrifices women made within the family, which included many unpaid roles. The accrual system provides for an out of community of property marriage with no sharing, which reverts back to a type of sharing of assets system upon death or divorce. All marriages by prenuptial contract in terms of which community of profit and loss are excluded, are now automatically subject to the accrual system.²²⁸ Only if accrual is expressly excluded by the prenuptial contract, with no other sharing, will there be a total no-sharing agreement. The separate estate of a spouse is not transferable or liable to attachment for debt during the marriage, nor does it form part of the insolvent estate of the other spouse.

The Matrimonial Property Act provides that the effect of the accrual system is the couple each have total control over their own estate during the marriage. On death or divorce the spouse whose estate shows a smaller accrual (gain), acquires a claim against the other spouse.²²⁹ This is for an amount equal to half of the difference between the accrual of the respective estates of the spouses. The estate of the other spouse is not transferable or liable to attachment for debt during the marriage, nor does it form part of the insolvent estate of a spouse.²³⁰ Inheritances, legacies and donations are not taken into account as part of the accrual of that spouse’s estate.²³¹ Testators and donors can however make alternative provisions regarding assets acquired from them. Proof of the commencement value of each person’s estate, less

²²⁷ S 2 Matrimonial Property Act, 88 of 1984.

²²⁸ S 2.

²²⁹ S 3(1).

²³⁰ S 3(2).

²³¹ S 5.

its liabilities, can be included in a statement with the prenuptial contract. This value is then used to calculate the accrual, with the accrual being the amount by which the end value of the estate exceeds the (adjusted) commencement value.²³²

Polygynous Contracts

Section 7(2) of the Recognition of Customary Marriages Act provides that customary marriages entered into after commencement of the Act may agree to use a prenuptial contract. However it is obligatory for any polygynous marriage entered into after commencement to make an application to court to approve a written prenuptial contract regulating the future matrimonial property system of the subsequent marriage.²³³ The court has the power to terminate an existing matrimonial property system that provides for sharing of a joint estate or accrual, and order division of the first estate to facilitate the arrangements for the second estate.²³⁴ All interested parties must be represented, including existing and future wives.²³⁵ The court must consider other family groups and divide the property equitably.²³⁶

At the date of a customary marriage any lobolo agreed to can be recorded as part of the registration, whether the marriage is monogamous or polygynous.²³⁷ Lobolo is defined in the Act as “property in cash or in kind... which a prospective husband or the head of his family undertakes to give to the head of the prospective wife’s family in consideration of a customary marriage”.²³⁸ Lobolo is contingent and can be transferred years after the marriage. Lobolo agreements should not be confused with prenuptial contracts. Payment of lobolo is not a requirement for customary marriage, although it can be used as proof of such a marriage.²³⁹ The family of couples in a civil marriage can also enter into a lobolo agreement.

²³² S 4 (1)(b)(iii).

²³³ S 7 (6) Act 120 of 1998.

²³⁴ S 7(a)(i)(aa)-(bb).

²³⁵ S 8.

²³⁶ S 7(a)(ii)-(iii).

²³⁷ S 4(4).

²³⁸ S 1.

²³⁹ While actual payment of lobolo is not necessarily a requirement for the marriage (depending on the local customary practice) it seems that an agreement about lobolo is universally required for the existence of a customary marriage.

With Client-Specific Terms

A prenuptial contract is an agreement between two parties. Like other legal contracts the parties are in many respects free to agree their own terms at their discretion. As with other contracts, terms may not be against the public morals and must conform to constitutional principles.²⁴⁰ Prenuptial contracts may not be “against the nature of marriage”. A stipulation that the spouses will not fulfil their common law duty of reciprocal support would, for example, be void.

Couples are therefore free to agree to a very wide range of arrangements that suit their personal needs, including using an accrual system with a variation of some of its consequences, or varying the percentage share of the accrual. Provisions can be made to make donations to third parties or to each other; they can be linked to specific conditions or time periods; they can include a provision that property reverts to the donor under particular circumstances; they can agree on succession and they can create trusts.²⁴¹ Individual customizations of prenuptial contracts can therefore incorporate very diverse terms. Unusual clauses are often drafted for wealthy clients, with their wealth triggering the need for more client-specific terms to protect individual wealth.

With a Pro-Poor Prenuptial Agreement

This thesis will argue that poverty equally triggers the need for client-specific terms for the poor as a class, to protect the poor’s housing benefits that have accrued to them from the State. Potential terms will be identified for incorporation within the existing standard statutory accrual form, for use by beneficiaries of *urban* State-subsidized housing entitled to private ownership. In principle, the terms should be useful for anyone facing the same poverty-related risks. This thesis will only address prenuptial contracts for recognized civil marriages. Conflicts of law arising out of the interface between customary law and the common law will not be considered. The study will however hopefully be of relevance to research under customary law and other marital traditions and to cohabitation and domestic partnership agreements.

²⁴⁰ See *Barkhuizen v Napier* 2007 7 BCLR 691 (CC) para 87.

²⁴¹ Van der Merwe *Notarial Practice* 80.

4.4.3.3 *Spousal Consent*

The Matrimonial Property Act²⁴² and the General Law Fourth Amendment Act²⁴³ abolished marital power of husbands over wives (with retrospective effect) giving wives equal capacity to contract and to litigate, with various restrictions on spouses married in community of property. The Recognition of Customary Marriages Act contains a similar provision.²⁴⁴ All spouses married in community of property therefore have the same powers regarding the disposal of property, the contracting of debts and management of the estate.

The Matrimonial Property Act has extensive provisions relating to written and oral consent that limit the power of a spouse in community of property to act alone in respect of jointly owned property.²⁴⁵ Decisions relating to immovable property such as the sale and mortgage of land and all sureties therefore require written consent and attestation before two competent witnesses.²⁴⁶ The aim of these provisions is to offer vulnerable spouses some protection.²⁴⁷ Nevertheless, poor owners of subsidized housing need protection of a distinctive nature, as will be discussed later.

These provisions protect the rights of spouses between each other. They also protect third parties who contract with a spouse if they could not reasonably have known that the consent requirements had not been complied with.²⁴⁸ Marriages out of community of property are not subject to this provision. A prenuptial contract is effective between the parties themselves without formalities, but is only effective against third parties after registration at the Deeds Office.

Conveyancers registering transfer of land must check the parties' prenuptial contracts to ensure all appropriate consents have been obtained before preparing the power of attorney to transfer ownership. With marriages in community of property, the

²⁴² Ss 11 and 15 Matrimonial Property Act 88 of 1984.

²⁴³ 132 of 1993, ss 29-30.

²⁴⁴ Act 120 of 1998, s 6.

²⁴⁵ Ss 15-16 Act 88 of 1984.

²⁴⁶ S 15(2)(a)-15(5).

²⁴⁷ See for instance *Visser v Hull* 2009 JOL 23670 (WCC) 1 where Mr Visser secretly sold the marital home to his cousins (at a fraction of its true value). Mrs Visser was able to vindicate the house because they were married in community of property.

²⁴⁸ S 15(9)(a) Act 88 of 1984.

conveyancer must ensure both spouses sign the power of attorney, proving consent. An affidavit is called for, requesting the parties to attach any marriage certificate and to confirm their marital status. This is particularly necessary in view of the old title deeds that only reflected the husband's name. These simple conveyancing steps are central to protecting spouse's rights and alerting third parties to the absence of consent, but leave unregistered customary wives and partners very vulnerable. The present relevance of prenuptial contracts being filed at the Deeds Office (where land rights are recorded) and the protective tenure security effect should not be underestimated.

4.4.3.4 Change of Matrimonial Property Regime

The Matrimonial Property Act includes provisions relating to the right to change matrimonial property regime. In order for a couple who agree to change the matrimonial property regime (or to authorize the registration of a notarial contract recording new arrangements) the court must be satisfied that there are sound reasons for the change, that sufficient notice of the change has been given to all creditors and that no other person will be prejudiced by the proposed change.²⁴⁹ One spouse is permitted to apply unilaterally for division of a joint estate²⁵⁰ or the accrual²⁵¹ if they can prove that their share of the estate will be prejudiced if the change is not made and that other people will not be prejudiced. A new regime can then be substituted according to what the court deems just. In the case of a prenuptial contract that excludes both in community of property and the accrual systems, it is compulsory for both spouses to apply for a change of regime, in keeping with the principal of freedom to contract. The Recognition of Customary Marriages Act has similar provisions for monogamous marriages.²⁵²

These are expensive procedures for the spouses to choose to follow, including court fees, lawyer's fees and the cost of advertising to let creditors know of the change. The "cure" for choosing the wrong matrimonial property system is therefore

²⁴⁹ S 21.

²⁵⁰ S 20.

²⁵¹ S 8.

²⁵² S 10(3) Recognition of Customary Marriages Act 120 of 1998.

generally only available to the affluent. “Prevention” in the form of a prenuptial contract currently has similar cost barriers.

4.4.4 LEGISLATION ON THE DUTY OF SUPPORT AND MAINTENANCE

4.4.4.1 Spouses’ Duty to Support Each Other

The Maintenance Act applies to any person who has a legal duty to maintain another person.²⁵³ The South African legal system provides that marriage brings about a duty of financial support between spouses. They also have joint responsibility for their mutual biological and adopted children, which duties are reciprocal regardless of the matrimonial regime. Any person who fails to pay maintenance in terms of a court maintenance order can have their immovable property sold in execution, up to the amount necessary to pay the outstanding maintenance.²⁵⁴ The Maintenance of Surviving Spouses Act provides that a surviving spouse has a maintenance claim against the deceased spouse’s estate.²⁵⁵

The spouses’ duty of support for each other ends on divorce. While the Divorce Act allows for maintenance payments, there is no automatic right to post-divorce maintenance for spouses and a court has the discretion to order what it deems just.²⁵⁶ When a court makes a maintenance order on divorce, the duration of the marriage, standard of living, ability to pay and ability to support oneself will be considered. The Act provides that private property settlements and maintenance may be agreed upon between parties and endorsed by the court as part of the divorce order.²⁵⁷ Failing this, the court will decide the content of the maintenance order. In the absence of the couple entering into an agreement on the separation of assets in a marriage in community of property, the court has almost no discretion when it comes to division, bar a forfeiture of benefits order.²⁵⁸ The property will be divided equally.

²⁵³ S 2 Act 99 of 1998.

²⁵⁴ S 26(1)(b) and 27(1).

²⁵⁵ Act 27 of 1990, s 2.

²⁵⁶ Act 70 of 1979, s 7 (2).

²⁵⁷ S 7(1).

²⁵⁸ S 9(1).

If a couple is married according to a prenuptial contract, the court must enforce the terms on divorce. There are two exceptions. One is the court's power to order a forfeiture of benefits in favour of one spouse in certain circumstances.²⁵⁹ The other is its power to redistribute marital assets from the economically stronger to the poorer spouse, if it is equitable and just. For civil marriages this only applies to a small minority of marriages (where couples married before the Matrimonial Property Act with a no-sharing contract) before the accrual system commenced.²⁶⁰ The *Gumede* case held that this rule is also applicable to all customary marriages, irrespective of the date of their conclusion.²⁶¹ The Recognition of Customary Marriages Act regulates customary divorce subject to the Divorce Act and requires that account must also be taken of arrangements made under customary law with regard to maintenance.²⁶² On divorce in such cases the court must ensure the property is divided fairly.²⁶³

Many of these provisions assume that there is property to distribute, or that one of the spouses can afford to pay spousal maintenance to the other. Both things are less likely in the case of the poor, making ownership of a subsidized house a crucial issue. Similarly, while maintenance awards may allow sufficient funds for the affluent to live on, the same does not apply for the poor. Poor litigants face major problems in divorce litigation, with inadequate legal representation leading to highly uncertain outcomes.²⁶⁴

4.4.4.2 *Other Duties of Support*

The common law duty of parents to maintain their children and give them shelter is confirmed in the Maintenance Act, with accommodation specified.²⁶⁵ Maintenance rights are however subject to the means (and reasonable needs) of the person claiming maintenance and the means of the person with the duty to pay. More

²⁵⁹ S 9(1).

²⁶⁰ S 7(3).

²⁶¹ *Gumede v President of Republic of South Africa* 2009 3 BCLR 243 (CC) para 42.

²⁶² S 8(4)(a) and (e) Act 120 of 1998.

²⁶³ S 8(4)(b).

²⁶⁴ E Van der Merwe and NF Zaal in "A Helping Hand For Disadvantaged Divorce Litigants: An Analysis of the Implication of MG V RG" (2014) 131 *SALJ* 537.

²⁶⁵ S 15(2) Act 99 of 1998.

remote relatives can be looked to for support, but only after closer relatives. Children's rights are entrenched in the Bill of Rights, which provides that every child has the right "to family care or parental care, or to appropriate alternative care when removed from the family environment" and "to basic nutrition, shelter, health care services and social services".²⁶⁶ In every matter concerning a child, the child's best interest is held to be paramount.²⁶⁷ The *Grootboom* Constitutional Court case puts the primary responsibility for ensuring that the child's constitutional rights are met (including housing) on the family.²⁶⁸

Marriage brings about a duty of financial support for a couple's mutual biological and adopted children, which duties are reciprocal regardless of matrimonial regime. Obligations of a parent towards a child from a first marriage do not have priority over any obligation towards any other child.²⁶⁹ Birth within marriage or without does not affect children's rights. These obligations may not be excluded in a prenuptial contract. Maintenance of minor and dependent children is compulsory under the Divorce Act if the parties have the means and the child does not have independent means.²⁷⁰ The Act provides that the welfare of the minor and dependent children must be considered first in any divorce order.²⁷¹ As the Cape High Court noted in the *Girdwood* case, the court must (as upper guardian of all dependent and minor children) establish what is in the best interests of children and ensure such interests are "effectively served and safeguarded" and no agreement between divorcing parties can encroach on this authority.²⁷²

A wider duty of support is also owed where there is a particular kind of legal relationship that gives rise to a duty to provide financial support. In civil law, the only relationships thus recognised are those of marriage, parent-child, grandparent-grandchild and a very residual duty between siblings. There is currently no explicit

²⁶⁶ S 28(1) of the Constitution. A child is defined in s 28(3) as a person under 18 years.

²⁶⁷ S 28(2).

²⁶⁸ *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) 1174.

²⁶⁹ S 2 and s 15(4) Act 99 of 1998.

²⁷⁰ Act 70 of 1979 s 6. This section provides that a divorce court may make a child maintenance order. However, the obligation to maintain a child arises from the common law and is governed by the common law rules. A minor child is not always entitled to financial support from its parents, such as if a minor child happens to have independent means (eg due to an inheritance).

²⁷¹ S 6.

²⁷² *Girdwood v Girdwood* 1995 1 All SA 650 (C) 657 and 659.

duty of support between opposite sex domestic and universal partners.²⁷³

4.4.4.3 *National Housing Code Definitions of Dependency*

When people do not have the means to take up their duties of support or maintenance in the form of shelter, the State is faced with a constitutional duty to facilitate access to housing.²⁷⁴ For the purposes of determining which households are entitled to apply for State-subsidized housing, the “financial dependents” of an applicant are defined in the National Housing Code as able to include:

- biological parents or parents-in-law
- biological grandparents or grandparents-in-law
- brothers/sisters under the age of eighteen or, if older, who are proven financially dependent on the housing applicant
- children under the age of eighteen (grand children, adopted children, foster children and biological children)
- any of the above persons over the age of eighteen who are still studying and who are financially dependent on the housing applicant
- extended family members who are permanently residing with the housing applicant due, for example, to health problems and who are proven financially dependent on the housing subsidy applicant²⁷⁵

In terms of the Code the word “spouse” also includes “any partner with whom a prospective beneficiary habitually cohabits”.²⁷⁶ In other words, dependency relationships such as a habitual cohabiting partner, an aunt or uncle, niece or nephew, and relatives by marriage are recognized (provided they are based on residence with the housing applicant and financial dependency upon them). Very significantly, the Code therefore recognizes additional relationships – based on *financial* dependency – that are not recognized in civil law.

²⁷³ It seems however, that in practice, the courts might be more willing to infer a tacit contract providing for reciprocal support between cohabitants, creating a legally enforceable duty of support. See A Barratt “Private Contract or Automatic Court Discretion? Current Trends in Legal Regulation of Permanent Life Partnerships” (2015) 1 *SALJ* 110.

²⁷⁴ S 26(1)(2) of the Constitution.

²⁷⁵ Department of Human Settlements Republic of South Africa “Part 3: Technical and General Guidelines” in *National Housing Code 2* (2009) 11, 13-14. These Guidelines applied as from 1 April 2007. The requirements differed prior to this date.

²⁷⁶ 13.

4.4.5 THE EFFECT OF SUCCESSION ON THE DUTY OF SUPPORT

The legislation relevant to succession is the Administration of Estates Act,²⁷⁷ the Immovable Property (Removal or Modification of Restrictions) Act,²⁷⁸ the Intestate Succession Act,²⁷⁹ the Maintenance of Surviving Spouses Act,²⁸⁰ the Reform of Customary Law of Succession and Regulation of Related Matters Act,²⁸¹ the Trust Property Control Act²⁸² and the Wills Act.²⁸³ Under South African law people are free to dispose of their immovable property as they wish by will. The ownership of the matrimonial home is determined according to the normal rules of the matrimonial property regime. The owner of a subsidized house is therefore free to leave their share of the house to someone other than their partner or the dependents they named in their subsidy application. If they are single (or married with the house excluded by prenuptial contract) they are free to bequeath the whole property. If married in community of property they can only bequeath their half share.

Where there is no will, the Intestate Succession Act and the Reform of Customary Law of Succession and Regulation of Related Matters Act provide for succession.²⁸⁴ Capacity to inherit is according to blood relationship or as a spouse. Spouses include certain unregistered customary, Muslim and Hindu marriages, as well as same-sex life partnerships that have agreed reciprocal duties of support. Adopted children, children born by artificial insemination or in terms of a valid surrogacy agreement are included.²⁸⁵ In most subsidized housing instances the surviving spouse would inherit the whole of the immovable property, as the minimum spouse's share is currently R250 000 (an amount usually in excess of the value of a subsidized house).²⁸⁶ Accordingly a subsequent spouse (who is not the spouse who originally obtained the subsidy) could inherit the property free of any obligations, other than

²⁷⁷ Act 66 of 1965.

²⁷⁸ Act 94 of 1965.

²⁷⁹ Act 81 of 1987.

²⁸⁰ Act 27 of 1990.

²⁸¹ Act 11 of 2009.

²⁸² Act 57 of 1988.

²⁸³ Act 7 of 1953.

²⁸⁴ Act 81 of 1987 and Act 11 of 2009.

²⁸⁵ J Heaton & A Roos *Family and Succession Law in South Africa* (2012) 205.

²⁸⁶ See S Burman L Carmody & Y Hoffman-Wanderer "Protecting the Vulnerable from 'Property Grabbing': The Reality of Administering Small Estates" (2008) 125 *SALJ* 134 146. The danger of this is discussed in the article with reference to the previous threshold of R125 000.

maintenance claims against the estate. They are no longer under a civil obligation to house the dependents of their deceased spouse, if they were not mutual dependents. Affluent parties who marry a beneficiary of State housing (in community of property) therefore indirectly benefit from the subsidy awarded for housing, due to the joint estate, at the expense of financial dependents.

Dependents would have the right to submit a maintenance claim against the estate of a deceased owner of subsidized housing. However poor and vulnerable household members are often not able to do so, due to an inability to access the justice system. In addition, those financial dependents (that are not cohabiting partners) that do not fall within the civil definition of a dependent would have no maintenance claim *at all*. Cohabiting partners previously recorded as “dependents” rather than “spouses” when the subsidized house was applied for, would have great difficulty claiming a share of the property.²⁸⁷ Similarly, if both spouses (or cohabiting partners) die, only those dependents recognized as civil dependents would inherit intestate, irrespective of their financial standing. Other financial dependents in need of housing would not inherit intestate. There is currently no automatic duty of support between opposite sex domestic and universal partners but they do have a duty of support for their children, including adopted children. There is also no automatic right to inherit intestate and no maintenance right, nor is there protection from eviction arising from the partnership alone. All of these issues are highly relevant to the use of succession clauses in pro-poor prenuptial agreements.

4.4.6 PARTNERSHIP AGREEMENTS BETWEEN COUPLES

Cohabitation in a monogamous partnership is colloquially described in South Africa as “living together” or “vat en sit” (take and stay). For those couples that intend to share the same responsibilities and obligations as a married couple, the Civil Union Act provides a route to formalize partnerships that results in the same consequences as marriage. Couples in stable relationships that do not wish to choose this route are seen as being in a domestic partnership. The South African Law Reform

²⁸⁷ No reference could be found for this method of recording spouses and cohabiting partners as a “dependent”, rather than according to the definition of “spouse”. The researcher is aware of this having occurred occasionally in the past (from her past experience).

Commission indicates that such people usually choose either not to marry, or cannot marry.²⁸⁸ It defines domestic partnerships as “established conjugal and non-conjugal relationships between unmarried people of the same or opposite sex”.²⁸⁹

Discussion of the urgent need for permanent life partnerships to be given equal protection to marriage is outside the scope of this thesis.²⁹⁰ The current legal status of opposite sex domestic partnerships is, as stated in the *Volks* case, that: “To the extent that any obligations arise between cohabitants during the subsistence of their relationship, these arise by agreement and only to the extent of that agreement”.²⁹¹ This is as opposed to marriage, where a number of obligations are triggered by operation of law.

Domestic partners are free to enter into a comprehensive contract agreeing their property arrangements, or individual contracts like joint ownership or leases, and to draw wills making each other heirs. Failing this they may alienate their property without the consent of their partner. Since agreements may be contested, written recording of any agreement is advisable. In the *Butters* case it was confirmed that while cohabitation does not create special legal consequences, certain types of domestic partnerships can be given added protection under the common law, based on a tacit and inferred agreement.²⁹² If a tacit universal partnership agreement can be proven, the court is obliged to make an equitable distribution of the estate.

For a couple to prove a universal partnership, there must be either express or tacit intention to bring present and future assets into the community. The parties must aim to avoid making a loss (i.e. to save money), both the parties must contribute, the partnership must operate to the benefit of both and the contract must be legitimate. The contribution need not be confined to a profit-making capacity and can include

²⁸⁸ South African Law Reform Commission *Report on Domestic Partnerships* (2006) (March 2006) 10 <http://www.justice.gov.za/salrc/reports/r_prj118_2006march.pdf> (accessed 15-07-2015).

²⁸⁹ 12.

²⁹⁰ See *Volks NO v Robinson* 2005 5 BCLR 446 (CC); B Goldblatt “Regulating Domestic Partnerships – A Necessary Step in the Development of South African Family Law” 120 (2003) *SALJ* 610; B Coetzee Bester & A Louw “Domestic Partners and ‘The Choice Argument’: *Quo Vadis?*” 18 *PER* (2015) 2951.

²⁹¹ Skweyiya J in the majority judgment (above) para 58.

²⁹² *Butters v Mncora* 2014 3 All SA 259 (SCA) para 11. There was no formal contract but the court could infer the existence of a partnership contract through examination of the parties’ conduct and the history of the relationship.

running the home and child rearing.²⁹³ Joint ownership is undivided but not necessarily in equal shares, but according to the agreement for which the normal rules of partnership apply. Under current law a universal partnership may not contradict the terms of a prenuptial contract. Succession clauses are not allowed in domestic partnership agreements, only in prenuptial agreements.

There is currently no automatic duty of support between opposite sex domestic and universal partners. In instances where one party has made a greater contribution it is possible (in theory) to claim back the extra contribution based on the unjust enrichment²⁹⁴ of the other party, although this would be difficult to prove in practice. Same-sex co-habiting couples have extended protection due to distinguishable case law.

Understandably not all cohabiting relationships can be seen as domestic or universal partnerships as defined above. As expressed in *Volks* the circumstances of cohabitation “can vary significantly. Some may be living together with no intention of permanence at all... others may be living together on the firm and joint understanding that they do not wish their relationship to attract legal consequences...”²⁹⁵ The legislature proposed a Domestic Partnership Bill in 2008 to clarify how domestic partnership issues should be approached and to address a broad range of rights. Its future is, however, uncertain.

4.5 SELECTED JUDICIAL PRECEDENTS

4.5.1 THE RIGHT AND DUTY OF SPOUSES TO COHABIT

While the Western Cape Constitution specifically mentions family, the national Constitution contains no express clause to protect the right to family life. In the *Dawood* case the Constitutional Court supported the Cape High Court’s view that the Constitution nevertheless meets “the obligations imposed by international human

²⁹³ Para 19.

²⁹⁴ *Volks NO v Robinson* 2005 5 BCLR 446 (CC) para 126.

²⁹⁵ See the dissenting judgment by Mokgoro J and O’Regan J para 120.

rights law to protect the right of persons to freely marry and to raise a family”.²⁹⁶ The case dealt with the granting of a temporary permit to a foreign spouse. The right to marriage was regarded as being protected under the Bill of Rights dignity provision. O Regan J held that since “a central aspect of marriage is cohabitation, the right (and duty) to live together, and legislation that significantly impairs the ability of spouses to honour that obligation would also constitute a limitation of the right to dignity”.²⁹⁷ Accordingly the case held that refusing a spouse a temporary permit was in effect an infringement of the constitutional right to dignity. This was based on marriage being seen as a relationship of profound personal significance, since cohabitation is an integral part of married life. The right of a poor married couple to live together is inevitably affected by the constitutional right to have access to adequate housing and not to be arbitrarily deprived of property.

4.5.2 THE RIGHT TO CONTRACT OUT OF SPOUSAL RIGHTS AND OBLIGATIONS

Marriage is considered to be a partnership of all life with certain invariable consequences, such that spouses cannot contract out of duties such as reciprocal support, cohabitation (with the right to occupy the joint matrimonial home) and sexual faithfulness. The consequences of marriage in community of property, as discussed previously, are regulated by law and not by contract between the spouses. As confirmed in the *Wijker* case forfeiture of assets can therefore not be allowed on grounds of the fairness of one spouse contributing more to building the joint estate than the other, as this would lose “sight of what community of property really entails”.²⁹⁸

The freedom to contract within the bounds of public policy (which is informed by the Constitution) is described by the Constitutional Court in the *Barkhuizen* case as giving effect to the central constitutional values of freedom and dignity, such that: “Self-autonomy, or the ability to regulate one’s own affairs, even to one’s own detriment, is the very essence of freedom and a vital part of dignity. The extent to

²⁹⁶ *Dawood v Minister of Home Affairs* 2000 8 BCLR 837 (CC) para 28.

²⁹⁷ Para 37.

²⁹⁸ *Wijker v Wijker* 1993 4 All SA 857 (AD) 867.

which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity”.²⁹⁹

A critical factor was held to be whether the contract was freely concluded and substantively fair. In line with this principle, current law does not allow for interference with the agreed content of prenuptial contracts, other than the narrow section 7(3) exception in the Divorce Act discussed above. The boundaries of this freedom to contract and assumptions of autonomy are questioned by Barratt.³⁰⁰ In the poverty context the possibility of undue influence or mistake for vulnerable partners when entering into any form of matrimonial property regime is undoubtedly heightened.

4.5.3 DISCRIMINATING BETWEEN MARRIED PEOPLE

Discriminating between people in the context of marriage has been extensively covered in constitutional case law. *Minister of Home Affairs v Fourie* was the landmark Constitutional Court case that addressed discrimination against same-sex couples on grounds of sexual orientation.³⁰¹

In it Sachs J reasoned that it was unfair that same-sex couples were neither able to achieve the “dignity, status, benefits and responsibilities” of couples that were free to marry, nor equal public and private status, as there was “no appropriate provision... to celebrate their unions in the same way”.³⁰² Similarly in the *Daniels* case the Constitutional Court held the use of the word “spouse” should be regarded as unfairly discriminatory if not inclusive of monogamous Muslim marital status, on grounds of religion and culture.³⁰³

²⁹⁹ *Barkhuizen v Napier* 2007 7 BCLR 691 (CC) para 57.

³⁰⁰ A Barratt “‘Whatever I Acquire Will Be Mine and Mine Alone’: Marital Agreements Not to Share in Constitutional South Africa” (2013) 130 *SALJ* 688 703.

³⁰¹ *Minister of Home Affairs v Fourie* 2006 3 BCLR 355 (CC).

³⁰² Paras 78 and 82.

³⁰³ *Daniels v Campbell* 2004 7 BCLR 735 (CC) para 40.

In the majority decision in the *Volks* case the Constitutional Court highlighted the difference between rights offered to married people and unmarried people as a class. The lack of equivalent benefits for surviving domestic partners to claim from a deceased partner's estate was determined as fair discrimination, on grounds of marital status, based on the differing duty to support owed by married and unmarried people.³⁰⁴

In *Van der Merwe* case the Constitutional Court held that it was inconsistent with the Constitution to disallow one class of married people (in community of property) to have the right to claim damages from their spouse and not the other class (out of community of property).³⁰⁵ This decision was not, however, based on marital status, but on the rationality requirement of equality, namely that any differentiation must have a rational connection to government purpose, recognizing that all have the right "to equal protection and the benefit of the law".³⁰⁶

4.6 CONCLUSION

It is a contention of this thesis that amongst the poor there is likely to exist a further category of people who live together, namely those who live together not because they do not wish to marry, but because they cannot marry. This being due to fear of the consequences of marriage upon their State-subsidized housing rights, arising from the default in community of property marital regime. This is an issue quite distinct from that of people who wish to remain in domestic partnerships being given equivalent benefits to marriage.

No access to appropriate prenuptial agreements places the unmarried poor in an analogous position to the couples Sachs J describes in the *Fourie* case above. For them too there is "no appropriate provision to celebrate their marriage in the same way" as affluent couples who can contractually protect their individual immovable property rights. It is outside the scope of this thesis to take further a constitutional inquiry. It must be left to other researchers to question whether failing to recognize

³⁰⁴ *Volks NO v Robinson* 2005 5 BCLR 446 (CC) para 60.

³⁰⁵ *Van der Merwe v Road Accident Fund* 2006 6 BCLR 682 (CC).

³⁰⁶ Paras 47-49. Referring to s 9(1) of the Constitution.

the poor's equal right to freely marry under the more protective accrual regime is constitutionally discriminatory and contrary to the legitimate aims of the State to promote security of tenure for the poor. Sachs J noted in the *Volks* case that the problem at the heart of the case was the lack of regulation of cohabitation rights *inter se*.³⁰⁷ This problem should not be seen as confined to a lack of statutory regulation of the consequences of cohabitation, but also to the poor's lack of access to private contractual mechanisms to agree the terms of their cohabitation.

³⁰⁷ *Volks NO vs Robinson* 2005 5 BCLR 446 (CC) paras 225-226.

CHAPTER 5

THE TENURE FRAMEWORK

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CHUNIESPOORT

J H Pierneef

1886-1957

5 THE TENURE FRAMEWORK

The words “I do” bring the most intense private and voluntary commitment into the most public, law-governed and state-regulated domain.

*Judge Albie Sachs*³⁰⁸

5.1 INTRODUCTION

Chapter 3 deals with the social issues in South Africa that affect the tenure relationships between members of a household or family horizontally, and chapter 4 with the legal framework. In this chapter the vertical relationship between poor households and State land and tenure information systems (that record land boundaries, legal entitlements and personal status) is explored. State records usually serve as the basis of formal rights enforcement. On the private side, any disjunction between these records (and the reality of their context) can be what formalizes miscarriages of justice against dependents by their own family or household. An example of this would be the effect of a civil marriage certificate (of a second wife) on a first customary wife who is unable to prove her prior marriage. Another example is that of letters of executorship that give the right to evict informal financial dependents, as a prelude to legal intestate heirs inheriting. On the public side, a lack of records to track people who are capable of housing their dependents (but not willing to do so) can be the driver of perpetual dependence of poor citizens on the State.

This chapter begins by defining tenure, followed by a brief summary of applicable housing law and the macrocosm of land information systems and current tenure thinking in contexts where informal practices are common. Matrimonial property agreements within this frame is then discussed, with an explanation of the approach that will be taken to the development of a pro-poor prenuptial agreement in chapter 6. The chapter concludes with a fictional life story incorporating informal practices and their formal land registration consequences, to show the effect of cohabiting choices upon land information systems and housing tenure.

³⁰⁸ *Minister of Home Affairs v Fourie* 2006 3 BCLR 355 (CC) para 63.

5.2 DEFINING LAND TENURE

Different meanings are attributed to the term “land tenure,” not least because there are different views on what it should mean. The Pierneef painting at the beginning of this chapter illustrates a customary form of land tenure that is relationally based, with kinship – as distinct from ownership – determining household units. The absence of people and other housing in the landscape raises the question of what belongs to whom, and why. For the observer with a viewing lens focussed on tenure, the building plan and the dwelling’s relation to each other is highly suggestive. It invites reflection on how occupant’s rights and responsibilities are predicated on boundaries drawn according to relational affinity. The vertical and horizontal “what”, “how” and “why” of the tenure (depicted in the 1945 painting) brings to the surface the shift away from relationally based tenure – to ownership tenure – in Africa in the 21st century. The image is therefore helpful for contemporary tenure thinking that wishes to focus on relational ties once more.

The United Nations definition of tenure is used for the purposes of this thesis, namely: “Land tenure is the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land.”³⁰⁹ This is seen to include the rules that decide how (and by whom) land may be used, controlled and disposed of, and the responsibilities and restraints surrounding this. Private perceptions of security are as significant for tenure as objective legal security, with such perceptions reflecting the degree of confidence that land users have that they “will not be arbitrarily deprived of the rights they enjoy over land and the economic benefits that flow from it.”³¹⁰ In other words whatever actually succeeds in protecting tenure – be it a State, private, formal or informal mechanism – is relevant. In this vein tenure reform is described by Pienaar as the “planned change or adjustment in the terms and conditions on which land is held, used or transacted,”

³⁰⁹ Food and Agriculture Organization of the United Nations *Land Tenure and Rural Development* (2002) (FAO Land Tenure Studies 3) 7.

³¹⁰ UN-Habitat *Affordable Land and Housing in Africa* (2011) United Nations Human Settlements Programme, Nairobi, Kenya (Adequate Housing Series 5) 3; FAO *Land Tenure* (2002) 18.

including reform of the rules that define land relationships “between and within communities and between communities and the state”.³¹¹

Formal land tenure covers those property rights capable of legal protection, either constitutionally, by statute, the common law or customary law. Customary land tenure can be formally or informally recognized. In both instances it is secured by means of membership of a community, according to community norms. Informal tenure covers those property rights that are not recognized by the formal justice system, but they may well be recognized by informal community structures. The term “extra-legal” is also sometimes used to refer to rights that are not formally recognized but not against the law.³¹² As Whittal indicates, “extra-legal and in many ways informal transfers generally follow a more socially mediated route involving fewer agents and professionals”.³¹³ When tenure is secured in this manner, social legitimacy is paramount. Land relations in Africa often “reproduce kinship ties,” with allocation of property based on need.³¹⁴ The challenge for land reform models is to identify, categorize and record the symbiotic rights and interests inherent in such relationships appropriately.

In South Africa tenure forms broadly follow either Western, customary or transitional hybrid forms, with the latter developing spontaneously at grassroots level.³¹⁵ Different forms have their own approach to use rights (such as housing), decision-making rights and rights of alienation. It has long been recognized that in rural areas formalization of informal land rights can lead to a loss of tenure security.³¹⁶ Odhiambo notes that arguments for formalization are more likely to be successful in respect of urban areas, but adds that top-down reform of land tenure institutions (rather than as a bottom-up reflection of change in the relationships on the ground) creates manifold problems.³¹⁷ Muyeba’s recent research in Khayelitsha

³¹¹ JM Pienaar *Land Reform* (2014) 384, with reference to M Adams, B Cousins & S Manana in n 30 and C Boone in n 31.

³¹² FAO *Land Tenure* (2002) 11.

³¹³ JF Whittal “The Potential Use of Cellular Phone Technology in Maintaining an Up-to-Date Register of Land Transactions for the Urban Poor” (2011) 14 *PER* 162 164.

³¹⁴ M Ochieng Odhiambo *Improving Tenure Security for the Rural Poor Kenya, Tanzania and Uganda – Case Study Formalization and its Prospects* (2006) 10.

³¹⁵ Pienaar *Land Reform* 379.

³¹⁶ See UN-Habitat *Handling Land: Innovative Tools for Land Governance and Secure Tenure* (2012) 23-24; E Sjaastad & B Cousins “Formalisation of Land Rights in the South: An Overview” (2008) 26 *Land Use Policy* 1 2-4.

³¹⁷ Ochieng Odhiambo *Improving Tenure Security* 15-16.

in the Cape challenges the value of ownership for low-income housing.³¹⁸ Kihato and Napier also note that the empirical evidence shows “people in poor communities make rational market decisions even in the context of insecure tenure, and how the categories of ‘formal’ and ‘informal’ make little sense in contemporary urban land markets”.³¹⁹ Increasingly urban informality in the secondary market and in the deceased succession of subsidized housing is coming under the spotlight, particularly in urban and peri-urban areas.³²⁰

Assisting vulnerable poor people to secure their rights and interests in land is central to current tenure debates. Payne and Durand-Lasserve see the primary objective of pro-poor tenure regularization policy as “to ensure protection for all households from forced eviction, harassment or other threats and the application of due process in assessing tenure claims and rights”.³²¹ Under current policy persons only qualify for a housing subsidy if it leads to secure tenure, with the focus on conventional formal tenure forms. In this vein the Housing Code states that: “Generally subsidies will be made available only to beneficiaries who acquire registered title to a property either in the form of ownership, leasehold, 99 year leasehold, or deed of grant”.³²² The pro-poor prenuptial agreement explored in this thesis looks for synergies between the formal law and the dependency arrangements of the poor, as relevant to the effect of “regularization” of informal cohabitation by formal marriage.

³¹⁸ S Muyebe *Does Low-Income Homeownership Work? The Effects of Titling Among Beneficiaries in Cape Town and Lusaka* (2013) D Phil Thesis University Of Cape Town.

³¹⁹ CW Kihato & M Napier “Choices and Decisions: Locating the Poor in Urban Land Markets” in M Napier, S Berrisford, CW Kihato, R McGaffin & L Royston *Trading Places: Accessing Land in Urban Cities* (2013) 91 94.

³²⁰ See M Barry & LM Roux “Perceptions of Land Registration in a State-Subsidised Housing Project in South Africa” (2014) *Autumn Housing Finance International* 27; R Kingwill “Papering over the Cracks: An Ethnography of Land Title in the Eastern Cape” (2014) 40 *Kronos* 241.

³²¹ Payne G & A Durand-Lasserve “Holding On: Security of Tenure - Types, Policies, Practices and Challenges”: Research Paper prepared for the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik, to inform her Study on Security of Tenure 22-23 October 2012 (2013) 44 <<http://www.ohchr.org/Documents/Issues/Housing/SecurityTenure/Payne-Durand-Lasserve-BackgroundPaper-JAN2013.pdf>> (accessed on 18-07-2015).

³²² Department of Human Settlements Republic of South Africa “Part 3: Technical and General Guidelines” in *National Housing Code 2* (2009) 16.

5.3 THE HOUSING LEGAL FRAMEWORK

5.3.1 LEGISLATION

5.3.1.1 *The Constitution*

The property clause in section 25 of the Constitution provides that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.³²³ Of particular relevance to this thesis are the provisions that “property” is not limited to land and that the State must take reasonable legislative and other measures to enable citizens to gain access to land on an equitable basis.³²⁴ The property clause not only offers protection against arbitrary State deprivation, but “also against an ‘unjust’ balance of power between individuals *inter se*, which should be eradicated on the initiative of the state”.³²⁵

The housing clause in section 26 of the Constitution provides that everyone has the right to have access to adequate housing. The State is required to take reasonable legislative and other measures to progressively realize this right within available resources. The section specifies that no-one may be evicted from their home without a court order after considering all the relevant circumstance and that no legislation may permit arbitrary eviction. The poor’s lack of access to the justice system often denies them the opportunity of benefitting from this right.

5.3.1.2 *The Housing Act 107 of 1997*

The primary legislation relevant to subsidized housing is the Housing Act of 1997.³²⁶ The definition of the meaning of “housing development” includes ensuring “viable households and communities” and giving access to permanent residential structures with secure tenure. The general principles applicable for housing development are outlined.³²⁷ The provisions that are relevant to this thesis are the requirements that

³²³ S 25(1).

³²⁴ S 25(4)(b) and s 25(5).

³²⁵ PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The Law of Property* 4 ed (2003) 11.

³²⁶ Act 107 of 1997.

³²⁷ S 2.

government must: prioritize the needs of the poor; consult meaningfully with individuals and communities; ensure as wide a choice of housing and tenure options as is reasonably possible; provide education; take measures to prohibit unfair discrimination on the ground of gender and other forms of unfair discrimination; take cognizance of marginalized women and other groups disadvantaged by unfair discrimination and recognize the need for expression of cultural identity and diversity.³²⁸

The Housing Act provides for the national housing databank and information system.³²⁹ Items of particular relevance are the duty of the Director-General to obtain access to existing sources of information and coordinate it with other official information (and to link the data bank or the information system to other systems). This duty is important in view of the flaws in the Deeds Registry search processes that do not currently highlight non-owner's rights, as discussed in below. The functions of municipalities are dealt with and they are required that they take all reasonable and necessary steps to create and maintain "a public environment conducive to housing development which is financially and socially viable" and to "promote the resolution of conflicts arising in the housing development process".³³⁰

Sections 10A and B of the Housing Act came into force in 2001. Section 10A creates a restriction on the voluntary sale of State-subsidized housing. It makes it a condition of a subsidy to a natural person (for the construction or purchase of a dwelling or serviced site) that they not sell or alienate within eight years of acquisition, unless the property has first been offered to the provincial housing department. No payment is due if the department accepts the offer, but the person has the right to apply for a new subsidy for the area to which they wish to relocate. Section 10B deals with the restriction on involuntary sale. It makes it a condition that successors in title and certain creditors shall not sell or alienate unless the dwelling or site has first been offered to the provincial housing department, at a price not greater than the subsidy received. This restriction does not have a time period.³³¹

³²⁸ S 2(a)(b)(c)(e).

³²⁹ S 6.

³³⁰ S 9.

³³¹ This right is seldom exercised in practice.

5.3.1.3 *General Statutes Relevant to Urban Subsidized Housing Ownership*

A number of different Acts are relevant to the urban development and registration process, including: the Alienation of Land Act; the Immovable Property (Removal or Modification of Restrictions) Act; the Conversion of Certain Right into Leasehold or Ownership Act; the Deeds Registries Act; the Development Facilitation Act; the Less Formal Township Establishment Act; the Local Government - Municipal Systems Act; the Upgrading of Land Tenure Act; the Wills Act; the Intestate Succession Act; the Reform of Customary Law of Succession and Regulation of Related Matters Act; the Administration of Estates Act; the Trust Property Control Act and the Matrimonial Property Act.³³² The Prevention of Illegal Eviction Act deals with eviction of unlawful occupiers and can be invoked in the urban subsidized housing environment.³³³

5.3.1.4 *The Deeds Registries Act 47 of 1937*

The first registration of a subsidized property transferred from the State to a housing beneficiary is registered in the name of an individual or co-owners. Future transfers of the property must be registered according to exactly the same system as other transfers under the Deeds Registry Act. In other words no second-class system of ownership is allowed. The Deeds Registries Act provisions for individual and co-ownership registration must be followed, with deeds following the sequence of their relative causes.³³⁴ This makes the Deeds Registries Act the most relevant Act for subsidized housing tenure security. When the right to ownership (or other real rights) vest successively in different people, each successive transfer must be registered. In other words if a person inherits, but dies before transfer, and their own heir inherits, and dies before transfer, three transfers are necessary before it can be registered in the name of the final heir. The first two transfers will be to the deceased estate of the successive deceased persons and the last to the final heir.

³³² Act 68 of 1981; Act 94 of 1965; Act 81 of 1988; Act 47 of 1937; Act 67 of 1995; Act 113 of 1991; Act 32 of 2000, Act 112 of 1991; Act 7 of 1953; Act 81 of 1987; Act 11 of 2009; Act 66 of 1965, 57 of 1988 and Act 88 of 1984 respectively.

³³³ Act 19 of 1998.

³³⁴ S 14 Act 47 of 1937.

Registration of immovable property in the name of married persons is provided for in section 17. The full name and marital status of title-holders must be stated. Status is defined as in community of property, out of community of property, or governed by customary law. The name of the other spouse in a marriage out of community of property is not included on a title deed. It is not compulsory to record a change in marital status on a current title deed, although this may be done by endorsement on divorce, division of the joint estate or change of matrimonial property system.³³⁵ The fact that endorsement is not always compulsory (on existing deeds in one spouse's name) saves costs, but it makes it more difficult for poor spouses, particularly women, to secure their rights.

Spouses married in community of property are unable to transfer ownership or contract to do so without the written consent (witnessed) of their spouse.³³⁶ This is due to them being co-owners *ex lege* from the moment of marriage or from the moment of acquisition of the property (unless it is an inheritance excluded from the community by the testator). The Deeds Registry Act provides clear rules for transfers and cessions from a joint estate and to unascertained children.³³⁷ It is compulsory with a future transfer from a couple married in community to include both names of the spouses in the power of attorney to transfer, and in the title deed giving transfer. However, if a title deed only reflects one name, the only practical process that will protect the other spouse is the status affidavit. This forms part of the conveyancing documentation. A transferor and transferee must attest whether they are single or married and whether the marriage is in or out of community of property. This is slender protection indeed for vulnerable spouses in dysfunctional relationships. Notably a transferor or transferee does not have to attest whether their prenuptial agreement includes differing provisions regarding land rights. It is the conveyancer's responsibility to call for the prenuptial agreement and check. Failure to do so (resulting in a loss of rights) could constitute professional negligence. A conveyancer would not, on the other hand, normally be held responsible for a fraudulent status affidavit resulting in a loss of rights.

³³⁵ S 17(4) and 45bis.

³³⁶ Ss 15(2)(a) and 15(5) Matrimonial Property Act 88 of 1984.

³³⁷ Ss 21 and 25 Act 47 of 1937.

The manner of registration of pre- and postnuptial contracts is specifically addressed in the Act.³³⁸ Conveyancers must prepare the deeds that are registered at the Deeds Office and they are responsible for the accuracy of the facts they contain. If it is a notarial deed, a notary must prepare it. Attorneys need additional qualifications to be registered as either a conveyancer or a notary respectively, meaning not all attorneys are conveyancers, and even fewer are notaries. The regulations to the Act provide how the identity of parties must be established and how servitudes and life interests must be brought forward in new title deeds, and that no conditions may be included that are not sanctioned by law.³³⁹ The original title deed must be lodged with a notarial deed creating a personal servitude, for endorsement of the title deed.³⁴⁰ The *usus* right in the prenuptial template creates a personal servitude over existing land owned, or the right to a personal servitude over future land not yet owned.

There are specific regulations dealing with requirements for lodgement of deeds and testamentary documents, with the notable requirement that if a testamentary document is already lodged at the Deeds registry, a second lodgement is not necessary.³⁴¹ A prenuptial agreement that includes a succession agreement is a testamentary document. The regulations also provide for the issue of a replacement deed for a lost deed, with the proviso that it must be accompanied by an affidavit by the owner confirming it is not held in pledge for a debt or otherwise.³⁴² The pledge clauses in the model prenuptial agreement make use of this mechanism to protect housing tenure.

The registrar is required to make the endorsements “on any registered title deed or other document as may be necessary to give effect to” a registration, or to the requirements of any law.³⁴³ The precise terms of a prenuptial agreement and the title deeds it affects are not currently correlated in the endorsement process. A Deeds Office search would merely indicate the existence of a prenuptial contract, the details of the existing registered owner or co-owners and the details of properties owned. The database search does not therefore draw the conveyancer’s attention to the rights

³³⁸ Ss 86-89.

³³⁹ Ss 15, 15A; Regs 18 and 35.

³⁴⁰ Reg 63.

³⁴¹ Regs 45, 49, 50.

³⁴² Reg 68.

³⁴³ S 3(1)(v).

and responsibilities content of a prenuptial agreement or servitudes. The deeds themselves must be studied to ascertain this. In other words both the endorsement process and the database search process (relative to marital status) do not harness the full power of making public information accessible.

The first transfers of subsidized housing are usually done in bulk. Standard wording would quickly be developed for processes if pro-poor prenuptial agreements and domestic agreements started being used regularly (before the first transfer of ownership). The optimum use of such agreements would therefore be to offer them to all applicants applying for subsidized housing, as part of the subsidy process.

5.3.2 THE PERSONAL SERVITUDES *USUS*, *HABITATIO* AND *USUFRUCT*

The Deeds Registries Act has various provisions for the reservation of servitudes in title deeds and the lapsing or mortgaging of servitudes.³⁴⁴ Section 65 of the Deeds Registries Act deals with the registration of notarial deeds creating personal servitudes. Personal servitudes confer rights on *particular individuals* to use and enjoy the immovable property of another.³⁴⁵ Since they are enforceable against the owner of the property, they are real rights burdening the land.³⁴⁶ In other words the ownership rights can only be exercised subject to the servitude rights. The best-known personal servitudes are *usus*, *habitation* and *usufruct*. The *usus* servitude offers the most limited rights of the three types, allowing for occupation of immovable property by the *usus* right holders, but no rights to sell or lease the property.³⁴⁷ No personal servitude of usufruct, *usus* or *habitation* may extend beyond the person's lifetime and such servitudes may not be ceded to any person other than the owner.³⁴⁸ The model prenuptial agreement will employ an *usus* servitude to secure dependent's housing rights.

Section 65 provides that restrictive conditions may be included in personal servitudes if they are capable of being enforced "by some person who is mentioned in, or, if not

³⁴⁴ Ss 67, 68, 69 Act 47 of 1937.

³⁴⁵ Badenhorst PJ, JM Pienaar & HM Mostert *Silberberg and Schoeman's The Law of Property* 5 ed (2006) 298.

³⁴⁶ 298.

³⁴⁷ 315.

³⁴⁸ S 66.

mentioned therein, is ascertainable from the said deed of transfer or from other evidence and such person, if determinable, has signified acceptance of such right". The registrar may waive the condition requiring that occupants (in whose favour servitudes are registered) must be parties to the contract, if impracticable. This could be relevant to dependents accepting the benefits the spouses agree on their behalf. No condition that does not restrict the exercise of any right of ownership is capable of registration. A housing right based on *usus* is such a restriction. Notably a deed containing a provision that is not restrictive may be registered if (in the opinion of the registrar) it is "complimentary or otherwise ancillary to the registered condition or right contained or conferred in such deed".³⁴⁹ "Complimentary" personal rights are not converted into real rights by registration.³⁵⁰ The alternative dispute resolution clauses in the model prenuptial agreement that is designed are complimentary provisions. It would still be the registrar's duty to register such an agreement despite such ancillary clauses.³⁵¹

A personal servitude can be included in a prenuptial agreement for endorsement against an existing title deed. If at the date of marriage a spouse already owns land, the prenuptial agreement would need to be lodged separately (with the original title deed) for the *usus* servitude to be endorsed against the title deed. Couples who do not own land before they marry are also free to register a prenuptial agreement agreeing terms for land that may be acquired in the future. A conveyancer would then need to arrange for the endorsement of the title deed on future transfer of ownership. While conveyancing and deeds registry officials may not be in favour of servitudes and prenuptial agreements being drafted in one notarial deed, there is no legal bar to this approach. Personal servitudes cannot be executed by reservation in the power of attorney to transfer ownership if a couple is married out of community of property. They must be by notarial deed.³⁵² A prenuptial agreement is however a notarial deed, although not conventionally used to create servitudes.

³⁴⁹ S 63.

³⁵⁰ FE van der Merwe *Notarial Practice* (2001) 140.

³⁵¹ Ss 3(1)(k)(o) and (r).

³⁵² Van der Merwe *Notarial Practice* 138.

The optimum use of a pro-poor prenuptial agreement (or cohabitation agreement) would be to offer legal aid in this regard to all couples when they put their names on the housing waiting list, as the agreement comes into effect on marriage. Alternately, if funding is limited, it could be offered at the time of signature of the sale agreement for the subsidized house.

5.3.3 POLICY

There have been several housing policy documents. The most relevant are the New Housing Policy and Strategy for South Africa White Paper of 1994, the Reconstruction and Development Programme (RDP) of 1994,³⁵³ the Comprehensive Plan for Sustainable Human Settlements of 2004³⁵⁴ and the National Housing Codes of 2000 and 2009.³⁵⁵ Various policy documents are also issued regularly to meet a need and for internal housing department use. As the 2009 National Housing Code (“the Housing Code”) states: “Owing to rapid changes in the socio-economic environment policy is continuously evolving”.³⁵⁶ Beneficiaries continue to refer to all subsidized housing capable of ownership under the new dispensation as “RDP” housing, a convention also followed in this thesis.

There are a number of different programmes for housing outlined in the Housing Code. The Social Housing Programme provides for rental housing, the Rural Housing Programme offers subsidies for housing in areas of communal tenure and the Farm Residents Housing Assistance Programme offers subsidies to provide housing for farm residents on privately owned farms (on an individual ownership basis after subdivision of the farm property or on a rental basis).³⁵⁷ There are also houses that were awarded prior to 1994, funded under the previous dispensation, for which ownership was granted at the time, or which were later upgraded from rights to occupy to rights to own. Other programmes of relevance to the concerns of this thesis are the Integrated Residential Development Programme, with one of the new

³⁵³ See Department of Human Settlements Republic of South Africa “Part 2: The Policy Context” in *Housing Code 1* (2009) 7-8.

³⁵⁴ 19.

³⁵⁵ Published under s 4 of the Housing Act 107 of 1997.

³⁵⁶ Department of Human Settlements “Policy Context” in *Housing Code 1* (2009) 7.

³⁵⁷ See Department of Human Settlements “Part 1: Simplified Guide to the National Housing Code” in *Housing Code 1* (2009) 23, 32 and 47.

aims to create social cohesion, and the Informal Settlement Upgrading Programme, which notes the need to support “fragile community survival networks,” for which it is considered important to ensure that processes include all members of the community, irrespective of whether they qualify for subsidies.³⁵⁸

Subsidies based on individual ownership can be obtained under a variety of schemes under the Housing Code, including the individual subsidy scheme, the consolidation subsidy and the enhanced discount benefit scheme.³⁵⁹ The subsidy amount for the construction of a 40sqm house in 2010 was R55 706, an amount that excludes the cost of the land.³⁶⁰ In 2015 the subsidy amount for a 45sqm house is R160 573.³⁶¹ The State not only drives housing developments, but also facilitates sales where potential buyers on the housing waiting list find a house to buy and comply with the criteria.³⁶² This seems a pragmatic approach to sales of previously subsidized houses that are sold after the restrictive period. It encourages formal transfer of ownership, since the subsidy includes a component for registration, whereby the State often covers both conveyancing and Deeds Office costs (as is also the case with the transfer of other subsidized houses).

The exchange value of the house is then of benefit to the sellers, and the occupation value moves to another needy household. There are however weaknesses in this approach, based again on the underlying manner in which the tenure is secured. After sale the exchange value remains under the sole control of the individual titleholders, to the exclusion of dependents. The housing tenure of the dependents in the buyer’s household also remains insecure going forward, due to the individual titling.

The Housing Code provides that it is the government’s duty to work progressively towards all South Africans having access to secure tenure and to this end “will have to apply legislative, administrative, financial, educational and social measures to

³⁵⁸ 13 and 16.

³⁵⁹ 29-38.

³⁶⁰ Department of Human Settlements “Part 3: Subsidy Quantum: Financial Intervention” in *Housing Code 3* (2009) 3.

³⁶¹ Western Cape Government “All You Need to Know about Housing Subsidies” (22-06-2015) *Western Cape Government* <<https://www.westerncape.gov.za/service/all-you-need-know-about-housing-subsidies>> (accessed 22-06-2015).

³⁶² Western Cape Government “Housing Subsidies”.

fulfil its housing obligations”.³⁶³ Fundamental principles include that the process is “people-centred”; creates an environment in which “all role players share in the risk associated with human settlement creation and in the rewards of improved housing opportunities” and is “participatory and decentralised”.³⁶⁴ Government must also promote the right of individuals to choose how to satisfy their housing needs, while also encouraging “collective efforts by people to improve their housing circumstances”.³⁶⁵

The National Housing Subsidy Database (NHSDB) is the official databank of all beneficiaries who have received housing assistance, both before 1994 and under the Housing Subsidy Scheme (HSS) post 15 March 1994. It includes a search facility to confirm citizenship and ownership status at the Deeds Registry, and to check existing records to confirm a subsidy has not been received before.³⁶⁶ It is mandatory for approved subsidies on the HSS to be uploaded on the NHSDB. Amongst the roles of HSS subsidy management is the capturing of the application details of a proposed beneficiary and “tracking of financial dependents that form part of a specific applicant household”.³⁶⁷ There is also an online component.³⁶⁸ The Western Cape has also developed a web-based platform that captures housing waiting list application details.³⁶⁹

On the level of land information systems and the Deeds Registry interface it should be remembered that it is the duty of the *conveyancer* or *notary* to check the marital status and property regime of parties for insertion in a deed for registration. A prenuptial contract must also be obtained and read, as the contract can specify particular immovable property rights. It is not the duty of the Deeds Office to check this. To summarize: the terms of a contract do not come up on an electronic deeds search, nor are they endorsed on a title deed where there is existing land owned

³⁶³ See Department of Human Settlements “Policy Context” in *Housing Code 1* (2009) 9.

³⁶⁴ 12-14.

³⁶⁵ 12-14.

³⁶⁶ Department of Human Settlements “Technical Guidelines” in *Housing Code 2* (2009) 109.

³⁶⁷ 112.

³⁶⁸ 114.

³⁶⁹ Western Cape Department of Human Settlements *Media Briefing: Housing Demand Data Improvement Programme (HDDIP)* (06-08-2013) (2013) 5

<<https://www.westerncape.gov.za/assets/departments/human-settlements/docs/mediabriefing-wc-dept-of-human-settlements-6august2013.pdf>> (accessed 15-07-2015).

subject to the terms; any terms in a prenuptial contract reflecting future rights (not yet capable of endorsement against a title deed) would not reflect on a deeds search, they would only be contained in the registered prenuptial agreement deed.

Again it would be the responsibility of the conveyancer attending to future transfers to ascertain any terms binding land in a prenuptial contract. Conveyancers would not under current circumstances consider it necessary to check for prenuptial agreements with low-cost housing transfers. The researcher has never come across one. This would, however, be a simple adjustment for those practitioners servicing the poor. Conveyancers who deal with subsidized housing take the restriction on sale conditions for “RDP” transfers as a given, something a conveyancer with an affluent client base would only realize on checking the title deed. Widespread use of a model prenuptial or cohabitation agreements would result in a similar adjustment.

5.4 LAND TENURE INFORMATION CHALLENGES

5.4.1 LAND TENURE INFORMATION SYSTEMS

Land administration systems need to be in touch with how holders of rights and interests perceive them, as well as with the institutionalized processes that give effect to securing rights and interests. A land administration system must therefore go beyond the cadastral system that describes land parcels, to include other systems that integrate, manage, disseminate and facilitate the use of cadastral information.³⁷⁰

Land information systems usually record rights according to the existing land registration and cadastral system conventions. In the customary setting, however, land information is often unwritten, being part of the “collective memory” and confirmed by witnesses and informal “proofs.”³⁷¹ Land *tenure* information systems may be defined as going beyond the conventional land information systems to include stakeholder information, with both cultural and use practices, as well as the

³⁷⁰ S Hull & J Whittal “Good e-Governance and Cadastral Innovation: In Pursuit of a Definition of e-Cadastral Systems” (2013) 2 *South African Journal of Geomatics* 342 345.

³⁷¹ Food and Agriculture Organization of the United Nations *Land Tenure and Rural Development* (2002) (FAO Land Tenure Studies 3) 13.

manner in which stakeholders relate to the land information system.³⁷²

As Royston and du Plessis note, there has been “an important paradigm shift on land, away from regarding land as a purely technical matter and towards a vision of pro-poor, gender-responsive, accountable and sustainable land management, to achieve tenure security for all”.³⁷³ This begs the question whether this broader view of recording land tenure information will be able to function parallel to the conventional land information system, without undermining it. Adding to the complexity is the fact that there has been little research on the urban context, with most of the focus on rural areas.³⁷⁴ Increasingly research attention is being given to the upgrading of informal settlements and informal practices.³⁷⁵ The tenure issues for subsidized housing occupy an interesting middle ground. Here tenure must play out according to the individualized title paradigm, but in a context where these titles are often given to households for whom ownership is either a relatively new, or even foreign, concept. This lack of personal knowledge of land ownership is due in part to the South African apartheid practice of denying rights of ownership based on race, as well as due to customary notions of land custodianship, rather than ownership.

In the light of prevailing land tenure challenges, land specialists are struggling to conceptualize and develop new, more inclusive, land information constructs. There are three (fairly recent and developing) approaches that are of particular relevance to pro-poor pre-nuptial agreements. The first is the land tenure continuum, the second the social tenure domain model, and the third the “tool box” of innovative land tools to promote pro-poor approaches (inclusive of the land rights continuum). Each of these initiatives is ongoing. They are very briefly discussed below.

³⁷² M Barry & LM Roux “A Change Based Framework for Theory Building in Land Tenure Information Systems” (2012) 44 *Survey Review* 301–314.

³⁷³ Royston L & J du Plessis “A Continuum of Land Rights: Evidence from Southern Africa” *Integrating Land Governance into the Post-2015 Agenda: Harnessing Synergies for Implementation and Monitoring Impact: Annual World Bank Conference on Land and Poverty, March 24-27 2014, Washington DC* (2014) 3 <https://www.conftool.com/landandpoverty2014/index.php/Royston-201_paper.pdf?page=downloadPaper&filename=Royston-201_paper.pdf&form_id=201&form_version=final> (accessed 17-07-2015).

³⁷⁴ 7.

³⁷⁵ A Durand-Lasserve “Informal Settlements and the Millennium Development Goals: Global Policy Debates on Property Ownership and Security of Tenure” (2006) 2 *Global Urban Development* 1 6-7.

5.4.2 A LAND RIGHTS CONTINUUM

The idea of a continuum of land rights is to design a model able to link a spectrum of formal, informal and customary rights, by including less conventional types.³⁷⁶ For Royston and du Plessis the challenge is to overcome the “‘fixation’ on ownership as the ultimate solution” and categorize such rights in a manner that “can help untangle tenure complexity; a complexity which often bedevils efforts to describe, communicate and analyse”.³⁷⁷ Whittal holds that new land rights continuums should be designed to accommodate diversity, be worldview neutral, include typologies that are not ranked, accommodate duality, diversity, flexibility and mobility and include all aspects that entrench tenure security, whether formal or informal.³⁷⁸ Her model is in the appendices, as an example for those legal readers trained in black letter law, for whom a continuum is likely to be an unfamiliar – and possibly even threatening – approach.³⁷⁹

The United Nations definition of tenure quoted above is typical of most definitions in its emphasis on tenure being a relationship among people, “as individuals or groups, with respect to land.”³⁸⁰ What is not commonly included in such continua is the recognition that the relationships *between people* (as individuals or groups) are themselves either formally recognized, customary or informal, in legal terms. In the South African context there are many cohabiting couples, as well as many customary and religious marriages not formalized according to statutory requirements. The law interprets the duties and rights of support for partners and dependents in these relationships along what is essentially a sliding continuum. This ranges from total non-recognition (as with a second customary wife when there is a first civil wife) to formal recognition (as with gay partners in life partnerships). Similarly formal rights on intestacy ignore informal relationship-based obligations that a deceased accepted for remote relationships. Insofar as informality may be defined as the lack of legal enforceability, the right to secure housing tenure arising out of such relationships

³⁷⁶ J Zevenbergen, C Augustinus, D Antonio & R Bennett “Pro-poor Land Administration: Principles for Recording the Land Rights of the Underrepresented” (2013) 31 *Land Use Policy* 595– 604.

³⁷⁷ Royston & du Plessis 2014 *World Bank Conference* 15-16.

³⁷⁸ J Whittal “A New Conceptual Model for the Continuum of Land Rights” (2014) 3 *South African Journal of Geomatics* 13 20-21. See also Barry M *Property Theory, Metaphors and the Continuum of Land Rights* (2015) 1 UN-Habitat / Global Land Tools Network (forthcoming).

³⁷⁹ App B 237 below.

³⁸⁰ FAO (2002) *Land Tenure* 7.

may therefore be categorised as formal or informal.³⁸¹ The position of partners, spouses and dependents on a relationship continuum (expressing the formality or informality of their relationship to each other) is therefore as relevant as that household or kinship group's position in a continuum relative to the land rights.³⁸²

5.4.3 THE SOCIAL TENURE DOMAIN MODEL

A continuum of land rights poses challenges for land information systems and the social tenure domain model (STDM) has been proposed as a standardized data model for land records, to systematise the inherent problems.³⁸³ The STDM can be described as “a tool for recording people-land relations, using modern technology and participative data collection methods”.³⁸⁴ The STDM focuses on recordable social tenure relationships – rather than rights capable of registration – and recognizes the need to record overlapping claims and personal use rights in particular.³⁸⁵ 1 It aims to handle imprecise and ambiguous descriptions, recording “not only registered, but also the range of rights in the continuum simultaneously... from formal rights: non-formal and informal rights, customary types, indigenous rights, tenancy, possession”.³⁸⁶ This is an ambitious aim, in view of the known negative effects of plural tenure systems, with conflicts increasing due to norms being contested in different institutions.³⁸⁷

Central to the STDM proposal is the need to record oral and off-register

³⁸¹ Other ancillary rights are also relevant to a household's capacity to retain secure housing tenure, such as the legal allocation of parental duties, intestacy rules and who has the right to claim damages, insurance, or pensions on the death or injury of a partner.

³⁸² While not specifically related to land tenure, CE Ross reflects on a continuum of social attachment in “Reconceptualizing Marital Status as a Continuum of Social Attachment” (1995) 57 *Journal of Marriage and Family* 129-140.

³⁸³ UN-Habitat *Handling Land* 32-33.

³⁸⁴ Saers P, C Lemmen, D Antonio, C Augustinus, M Molendijk & K De Zeeuw “Social Tenure Domain Model - A Strategy Towards Country Implementation” in *Linking Land Tenure and Use for Shared Prosperity World Bank Conference on Land and Poverty 23-27 March 2015, Washington DC* Paper 2015 (2015) 5.

³⁸⁵ JA Zevenbergen, HT Uitermark & CHJ Lemmen “Cadastral Information: More than Base Data” (2009) 47 *Core Spatial Data NCG 73* Zevenbergen J, HT Uitermark & CHJ Lemmen “Cadastral Information: More than Base Data” (2009) 47 *Core Spatial Data NCG 73* <http://www.ncgeo.nl/index.php?option=com_k2&view=item&id=2366:gs-47-peter-j-m-van-oosterom-editor-core-spatial-data&Itemid=352&lang=en> (accessed 27-07-2015).

³⁸⁶ 73.

³⁸⁷ Van Asperen P *Evaluation of Innovative Land Tools in Sub-Saharan Africa: Three Cases from a Peri-Urban Context* (2014) 35.

arrangements that are socially recognized, particularly amongst the poor.³⁸⁸ Such new forms of recording are sometimes described as “progressive cadastres”, “halfway”, “grassroot”, “flexible”, “pro-poor” and capable of offering a degree of tenure benefit that can be a first step to greater benefits over time for the urban and rural poor who constitute the majority in developing countries.³⁸⁹ Amongst the concerns is support for women’s rights that are “nested in family rights,” as well as the facilitation of the incremental upgrading of weak rights and fair succession processes.³⁹⁰ The aim of the STDM is not to exclude formal streams of information *per se*, but to include informal ones. Augustinus sees the STDM as contributing to overcoming gender disparity (sic) by recording women’s rights and empowering them to claim these, thereby contributing to the rule of law.³⁹¹ She adds that succession for children is such a big issue for the poor that the STDM must work towards offering key information necessary to resolve disputes and to avoid arbitrary decisions in this regard.³⁹² The Talking Titler system builds on this approach by developing an evolutionary and self-adaptive land tenure information system able to keep pace with changing information.³⁹³ The STDM itself is also evolving.

The unit of a cohabiting couple and the resulting dependency relationships is therefore foundational to social tenure. This puts formal and informal cohabitation agreements – and their degree of social recognition – at the centre of social tenure. They should accordingly also be central to social tenure systems development. The conventional perception of a prenuptial or cohabitation agreement as being to deal with an intimate couple’s rights and responsibilities alone is, however, too narrow. The model prenuptial agreement will therefore work towards a wider spread of protection including dependents.

³⁸⁸C Augustinus “Social Tenure Domain Model: What It Can Mean for the Land Industry and for the Poor” *Proceedings of the XXIV FIG International Congress, 11-16 April 2010, Sydney, Australia* (2010) 1 7-8.

³⁸⁹ J Zevenbergen et al (2013) *Land Use Policy* 595, citing Henssen 2010.

³⁹⁰ Augustinus *Proceedings of the XXIV FIG International Congress, 11-16 April 2010, Sydney, Australia* (2010) 2-3.

³⁹¹ 13.

³⁹² 11.

³⁹³ M Barry, R Molero & A-R Muhsen “Talking Titler: Evolutionary and Self-Adaptive Land Tenure Information System Development” (2013) 2 *South African Journal of Geomatics* 1.

5.5 PRO-POOR LAND TOOLS

5.5.1 THE GLOBAL LAND TOOL NETWORK

The lack of affordable pro-poor land tools for documenting and recording such social tenure is recognized, as well as their importance in providing *de facto* and *de jure* information for alternative dispute resolution processes and formal title adjudication.³⁹⁴ The Global Land Tool Network (GLTN), co-ordinated by UN-Habitat, recognizes the need for a new set of “innovative land tools” capable of being used for pro-poor purposes. In 2012 they enumerated 18 possibilities, with conventional land market tools based on legal systems, and innovative land tools arising from “socially derived systems.”³⁹⁵ The GLTN tools list identifies the following issues under access to land and tenure security:

- a participatory approach to ascertaining the tenure information that is enumerated
- building on the continuum of land rights
- maintaining the currency of deeds or titles
- ensuring records reflect socially appropriate adjudication of rights allocation (particularly for women and disadvantaged groups)
- linking both statutory and customary tenure to formal information systems
- co-management approaches that include local communities
- maintaining land record management for transactability
- including ways to record the allocation of rights to family and group rights³⁹⁶

The enumeration of a party as an individual spouse, cohabiting partner or dependent – as opposed to a household or family – should be a key part of the land information system process. As such, they need to reflect on electronic Deeds Registry searches. The creation of codes that enumerate people and parties is one of the preliminary steps for a land information system.³⁹⁷ Yet, as Varley notes, debates that overlook

³⁹⁴ Augustinus *Proceedings of the XXIV FIG International Congress, 11-16 April 2010, Sydney, Australia* (2010) 9-10.

³⁹⁵ Van Asperen *Innovative Land Tools* 25.

³⁹⁶ UN-Habitat *Handling Land* 13.

³⁹⁷ C Lemmen, P Van Osterom & R Bennet “The Land Administration Domain Model” (2015) *Land Use Policy* 1 1 in press.

the “private, the domestic and the feminine” are problematic, in that it is “difficult to exaggerate the importance of family in the self-help housing process... People equate building a house with building a family, and the home symbolizes the union of the family group”.³⁹⁸ She argues that failure to take into account the emotional connections between people “undermines our ability to understand the consequences of legalization”.³⁹⁹ This makes the absence of marriage certificates or cohabiting agreements highly important to the challenges of recording social tenure based on kinship and household structures.

In chapter 6 a prenuptial agreement is developed for use as a pro-poor land tool. Despite extensive reading the researcher is not aware of any other research in this regard, or the development of a similar tool. The conceptualization was greatly eased by the South African approach to record keeping for subsidized-housing. As explained in chapter 4, in terms of the Housing Code, *de facto* financial dependents as well as *de jure* legal dependents are recognized, both for determining rights to housing and for record keeping purposes. The 2009 Housing Code beneficiary and dependent requirements are highly significant as a forerunner of the social tenure information approach.⁴⁰⁰ This researcher is of the view that this constitutes an existing South African land information system that is already recording social tenure within – and parallel to – formal tenure records. In addition, housing beneficiaries come from both urban and rural backgrounds, with evidence of Western ownership rules being accepted, as well as reversions to informal practices.⁴⁰¹

The definition of dependents in the Housing Code as “financial dependents” means housing databases can potentially include multiple views of household formation, as the actual dependents are not necessarily legal dependents. They can include both

³⁹⁸A Varley “Private or Public: Debating the Meaning of Tenure Legalization” (2002) 26 *International Journal of Urban and Regional Research* 449 457-8.

³⁹⁹ 458.

⁴⁰⁰Department of Human Settlements “Technical Guidelines” in *Housing Code* 2 13.

⁴⁰¹M Barry & LM Roux “Land Narratives and Land Registration in State-Subsidised Housing in South Africa” *Proceedings of the FIG Working Week, 17-21 May 2015, Sofia, Bulgaria* Paper 7852 (2015)

<http://www.fig.net/resources/proceedings/fig_proceedings/fig2015/papers/ts06b/TS06B_barry_et_al_7852.pdf> (accessed 10-07-2015).

relationships backed up by formal documentation and some informal relationships.⁴⁰² This means the South African subsidized housing arena is relevant to many of the current tenure debates, with the added benefit of the land being surveyed (with no disputes as to the physical boundaries and extent). This makes household formation in urban subsidized housing fertile ground for studying the viability of parallel pluralist systems in securing land tenure for the poor. Anyone working on pro-poor codes (for use with land information systems) would be well advised to analyse the approach of the South African Housing Code.

5.5.2 FORMAL LAND TOOLS

The land rights continuum, the STDM and pro-poor land tools are all heavily informed by the need to accommodate informal usages. Since the formal land tools are well known, this thesis will only raise the formal land tools that are directly relevant to the pro-poor prenuptial agreement that will be constructed in the next chapter. On the formal side of the land rights spectrum, title deeds reflecting ownership (and servitudes limiting that ownership) require registration in the South African deeds registry to function as real rights. Servitudes are registered either directly in a title deed, or by a notarial deed. A prenuptial contract is also a notarial deed and similarly must also be registered at the Deeds Office. Being a notarial deed, it has the capacity to re-determine land ownership rights and obligations while simultaneously creating personal servitudes. In addition it can establish a notarial trust or succession agreement, as well as entrench third party benefits. This means it has the benefit of “four for the price of one,” as well as being totally orientated towards personal relationships and property. This makes it an extremely viable “conventional” legal tool to serve as an innovative pro-poor land tool.⁴⁰³

Making a document part of a public register has tremendous power to secure land rights and tenure. Even the informal registers of civic movements (such as the South African National Civic Organisation registers of occupants in informal developments) carry considerable weight. The title deed system offers a public

⁴⁰² Department of Human Settlements “Part 3: Technical Guidelines” in *Housing Code* 2 13. See ch 4.

⁴⁰³ This is demonstrated in ch 6 and 7.

record of rights, restrictions and responsibilities relevant to land. Wills, on the other hand, can be privately drawn and do not have to be lodged in a formal registry until after the testator's death. Accordingly they do not fulfil a tenure security function. Conversely, a prenuptial contract (and any succession agreement it incorporates) has the benefit of being a public record.

In South Africa the formal marriage, birth and death records are not linked to the searches available from the Deeds Registry, nor are they easily accessible to the public. This is a major disadvantage to the poor, as these records are largely up-to-date and highly relevant to land rights and tenure. Births, marriages, cohabitation and deaths are foundational for all private tenure relationships. As van Asperen notes, for *de facto* tenure security land beneficiaries must be confident about land processes and trust the land administration system, otherwise it will not be used.⁴⁰⁴ The current situation – in which simple information about births, marriages and deaths is not easily accessible – counteracts any argument to the poor that such a state-run information system is advantageous to them.

5.5.3 SPORADIC UPTAKE OF NEW LAND TOOLS

For a pro-poor prenuptial agreement to be practicable, it is imperative the target group sees the recording of the norms intrinsic to their relationship as both possible and desirable. As Van der Molen notes, “where relationships from man to land are not recognized and where norms and values concerning these arrangements are not transparent, reliable and predictable, then recording or registration is meaningless”.⁴⁰⁵ There is a very great need for poor dependents to be able to access transparent records that can predict the support rights upon which they can rely. The desire to create records of domestic agreements would, however, need to be community driven.

Prenuptial contracts are largely a foreign concept for many South Africans, meaning they are likely to be received with caution. Nevertheless, tenure researchers do not

⁴⁰⁴ Van Asperen *Innovative Land Tools* 30.

⁴⁰⁵ P Van der Molen “The Dynamic Aspect of Land Administration: An Often-Forgotten Component in System Design” (2002) 26 *Computers, Environment and Urban Systems* 361 368.

see initial slow and sporadic uptake of new social tenure approaches as an indicator of their failure. Rather, they recognize that support for new systems will grow as people become more aware of what they have to offer.⁴⁰⁶ As such the use of prenuptial contracts could increase. The contracts themselves could also evolve over time, with some couples initially entering into less formal agreements (that only partially record rights and obligations) that are still capable of assisting with community enforcement of the duties of support they contain.

5.5.4 STANDARD PROCESSES FOR TOOLS THAT RECORD RIGHTS

A standard prenuptial contract would be the starting point for development of such agreements as a land tool. This would be necessary both to familiarize the target group with its terms and to keep the process within an affordable legal aid range. Zevenbergen *et al* note there is an increasing trend for informal transactions to be recorded on paper.⁴⁰⁷ Based on this they recommend this trend be built upon by the introduction of standard formats for land information recording purposes. De Soto defines standardization as an archetype, with standards as “recognized patterns of consensually approved practice which convert documents from *ad hoc* narratives to structured representations of reality which can be organized within a single interconnected system with dynamic properties”.⁴⁰⁸ All efforts at titling and standardization are doomed to failure if they are inflexible, as informal practices are then reverted to, being closer to the real needs on the ground. The aim should be to “accommodate diversity and overlap in tenure arrangements and family relations, but bring clarity if, and when, possible”.⁴⁰⁹ South African housing processes and standard formats for recording financial dependents speak into this, but do not go as far as they could. Reducing private prenuptial and cohabiting agreements to writing would add clarity to family relations.

⁴⁰⁶ J Zevenbergen et al (2013) 31 *Land Use Policy* 599.

⁴⁰⁷ 601.

⁴⁰⁸ H de Soto “The Challenge of Connecting Informal and Formal Property Systems: Some Reflections Based on the Case of Tanzania” (2006) *Realizing Property Rights* 18 47. See also the discussion on artifacts in ch 2 23.

⁴⁰⁹ J Zevenbergena et al (2013) 31 *Land Use Policy* 601.

5.5.5 ACCESS TO INFORMATION AND ENFORCEMENT MECHANISMS

Land information records are of limited benefit to the poor if they cannot access them easily. The prevailing feeling is that whenever possible land rights records should be held locally, with land registration itself remaining a central government function.⁴¹⁰ A copy of a prenuptial contract is held in the central Deeds Registry. As a notarial deed, it is also compulsory for the notary to keep a duplicate original in his or her protocol.⁴¹¹ Ideally a copy should also be lodged with the municipality where the property is situated, as part of the beneficiary record keeping. This would give three points of access to the contract for household members, third parties and government officials – the Deeds Office, the local notary and the municipal housing department.

The method of recording land information should also be assessed in relation to its value in resolving disputes. For this purpose not only access to the records is necessary, but the records must also serve to diminish conflict, not exacerbate it. The pro-poor GLTN issues for land and tenure security listed in 5.5.1 above include the need for “socially appropriate adjudication.” A land information system should not rest upon the laurels of an initial successful capturing of rights allocated in a socially appropriate way. Any method for creating a land record should anticipate future disputes over the rights allocated and recorded. The record rapidly loses its value if it widens the door for informal solutions to break the law in a manner that corrupts the initial record base. Regression to informality with sales of “RDP” housing is a recognized problem.⁴¹² The alienation or succession of subsidized housing results in the eviction of its occupants in favour of other occupants. A prenuptial agreement is the conventional land tool *par excellence* to anticipate future disputes triggered by sales, succession or the eviction of a cohabiting partner.

In the context of poverty the first thing that must be anticipated with regard to future conflict, is the likelihood that it will be dealt with informally. Cornwall and Nyamu-

⁴¹⁰ 602.

⁴¹¹ Van der Merwe *Notarial Practice* 11 and 81.

⁴¹² G Payne, A Durand-Lasserve & C Rakodi “The Limits of Land Titling and Home Ownership” (2009) 21 *Environment & Urbanization* 443 451.

Msembi warn that the difficulty of accessing the institutions that might enforce the poor's rights should not be underestimated.⁴¹³ This is why community and neighbourhood recognition is often considered more important for ensuring secure tenure than recognition by public authorities.⁴¹⁴ The pro-poor prenuptial template drafted in the next chapter will therefore have as its focus the drafting of an agreement that could also be informally used to enforce land rights. In other words it could function as a domestic partnership agreement, with it being legally registered as a prenuptial agreement an added benefit. The model template's value for enforcement under the formal system is that mere production of the registered agreement would serve as *prima facie* proof of a history of right-holders. Despite the passage of time this would obviate the need (in most instances) to lead further factual evidence regarding who holds rights to housing and ownership.

The thesis will not attempt to give an overview of the formal South African adjudication forums. Legal aid is minimal and where compulsory its efficacy is often open to doubt.⁴¹⁵ The formal court route is also as taxing for a household as a nation embarking on a civil war, with formal mediation only tempering this to an extent.⁴¹⁶ The drafting of the template assumes informal bodies (such as family, friends, neighbours, street committees, religious leaders, social workers and community leaders) will play the largest part in enforcing the agreement, with public officials only approached if this fails. As Cotula says, in the land tenure context the legal emphasis on technical issues rather than power imbalances, and its focus on State institutions rather than civil society, is not helpful.⁴¹⁷ The aim of the prenuptial approach is primarily to facilitate informal resolution of conflict *before* it escalates to the point where a court action would be considered. Clearly delineated pre-agreed rights would assist this process. Cotula rightly holds that the aim of legal empowerment must be for disadvantaged people to freely articulate their priorities

⁴¹³ A Cornwall & C Nyamu-Musembi "Putting the 'Rights-Based Approach' to Development into Perspective" (2004) 25 *Third World Quarterly* 1415-1418.

⁴¹⁴ Payne & Durand-Lasserve "Holding On: Security of Tenure": Research Paper prepared for the Special Rapporteur" (2013) 44.

⁴¹⁵ D Holness "Recent Developments in the Provision of Pro Bono Legal Services by Attorneys in South Africa" (2013) 16 *PER* 129 137-138.

⁴¹⁶ In those instances where children are involved mediation must be in their best interest. See J O'Leary *Mediation in Family & Divorce Disputes: A Guide for Clients and Mediators* (2014) 52-55.

⁴¹⁷ L Cotula "Legal Empowerment to Secure Land Rights - Defining the Concept" in L Cotula & P Mathieu (eds) *Legal Empowerment In Practice: Using Legal Tools to Secure Land Rights in Africa* (2008) 7 14.

and gain greater control over the “decisions and processes that affect their lives”.⁴¹⁸

5.6 PRENUPTIAL AGREEMENTS AS A TENURE TOOL

5.6.1 DIFFERENTIATING PRO-POOR PRENUPTIAL AGREEMENTS

As stated, in the next chapter a pro-poor prenuptial agreement template will be designed. The value of land records as evidence of contractual relations, to prevent future conflict, is recognized.⁴¹⁹ Nevertheless, suggesting that a prenuptial contract would serve as a useful pro-poor land tenure tool meets with surprise from all quarters. Prenuptial agreements are seen as a formal tenure tool for the affluent. They are used primarily to protect assets, particularly land assets, from the consequences of relationships that break down. Nevertheless, they are *all* about social tenure.

A conventional prenuptial contract fortifies an individual and his or her “castle” against the risks triggered by dysfunctional relationships. The agreement’s contractual walls are built to withstand the onslaught of creditors, who consider it ethical they be paid back for legitimate debts owed. Similarly, the contractual ramparts are designed to protect against the invading armies of a previous lover and their relatives in the married line. Divorce serves as the signal to raise the contractual drawbridge and loose legal crocodiles to secure the waters against informal attack. The drafting notary is a legal high priest steeped in esoteric knowledge of the ways in which original sin surfaces in cohabiting relationships. While a notary is generally consulted just before marriage (for advice on a matrimonial regime conducive to marital bliss) their skills lie in knowing the best defensive weapons to survive the poison arrows of a lover spurned. Prenuptial contracts are premised on an adversarial legal system and the belief that to protect people, you protect their assets. This can result in contracts that focus on being highly sensitive (for example) to tax benefits, while being entirely insensitive to

⁴¹⁸ 10.

⁴¹⁹ J Zevenbergen et al (2013) *Land Use Policy* 598.

principles of fairness and equity.⁴²⁰

The question may therefore be asked: of what possible value are prenuptial agreements to the poor? One answer, for the South African context, is the country has a long and still present history of negotiating lobola agreements. The second answer accepts the truth of the idiom “better the devil you know.” The devil that prenuptial contracts know is the devil of the tenure consequences of a relationship breakdown, and the need to deal with this up front. High numbers of women in South Africa are subjected to violence, with a 2004 study indicating that a woman is killed by her domestic partner every six hours.⁴²¹ The potentially adversarial nature of domestic life and cohabitation cannot be overlooked. Once removed from the need to be informed by tax and wealth, prenuptial contracts have huge pro-poor potential, most of which is never used. Notable within this list of potentialities is the ability to include benefits for third parties, to determine succession, and to agree to alternate dispute resolution such that antagonism can be privately defused.

5.6.2 USE OF CONVENTIONAL APPROACHES

The prenuptial template design in chapter 6 allows couples to choose their own housing tenure and succession regime. This fits well with the STDM strategy of encouraging people to introduce “new forms of legal evidence into the system, which fit more with the social tenures of local communities”.⁴²² Legitimacy, legality and certainty are central to tenure security.⁴²³ The template uses many of the formal legal mechanisms to liberate the poor to participate in deciding their own tenure future, determined relationally. Conventional views of securing tenure are therefore appropriated, to strengthen weak rights. The aim therefore is to create a marital agreement that can be relied upon informally after registration, but which is equally capable of enforcement in the formal system.

⁴²⁰ For a further discussion of this see Barratt A “Whatever I Acquire Will Be Mine and Mine Alone’: Marital Agreements Not to Share in Constitutional South Africa” (2013) 130 *SALJ* 688.

⁴²¹ S Mathews, N Abrahams, L Martin, L Vetten, L Van der Merwe & R Jewkes : “‘Every Six Hours a Woman is Killed by her Domestic Partner’: A National Study of Female Homicide in South Africa” *MRC Policy Brief* (2004).

⁴²² J Zevenbergen et al (2013) *Land Use Policy* 597.

⁴²³ Whittal (2014) *S A Journal of Geomatics* 23.

Van Oosterom and Lemmen see the core component of conventional cadastral domain models as needing to comprise person classes, and legal or administrative classes. The legal and administrative classes include rights (legally defined), restrictions (allowing someone to do something) and responsibilities (something you must undertake to do). Within this model they see legal documents as the source for the primary rights of ownership, freehold and leasehold, with rights such as usufruct and personal servitudes subtracting from these as the “strongest right”.⁴²⁴ According to this definition (of a legal document as a source of rights) the prenuptial agreement entrenches rights to ownership and limits them at the same time, while incorporating restrictions and responsibilities. As a legal document worthy of formal record, a prenuptial contract satisfies the soul of the purest of legal purists. Nevertheless, the pro-poor template does not proceed from the perspective of ownership as the strongest right, but from the perspective of entrenching a housing right that is stronger.

Van der Walt, a leading South African property law theorist, has for some time recommended the extension of use rights.⁴²⁵ An overlapping interests approach to entrenching rights is accordingly central to the drafting method of the pro-poor prenuptial template. The personal servitude of *usus* is therefore registered, constituting the dependents’ interest in inalienable housing as a real right.

The “person class” in the template is extended beyond the couple themselves, to support family and group rights, thereby securing the current informal housing rights of financial dependents. While the approach taken does not preclude future sales, it discourages speculation, as all alienations are subject to the core housing right. In keeping with pro-poor approaches, the use value is prioritized above the exchange value in this way, with the use right very close conceptually to a secondary customary use right. From a land information perspective this adjustment of the “person class” should preferably be captured in government databanks in a manner capable of assisting with the securing of the right.

⁴²⁴ P Van Oosterom & C Lemmen “7: Legal Administrative Classes” in “The Core Cadastral Domain Model: A Tool for the Development of Distributed and Interoperable Cadastral Systems” (2006) *International Conference on Enhancing Land Registration and Cadastre for Economic Growth in India, New Delhi, 31Jan-1 Feb 2006, New Delhi* (2006).

⁴²⁵ AJ Van der Walt “Property Rights and the Hierarchies of Power: A Critical Evaluation of Land Reform Policy in South Africa” (1999) 64 *Koers-Bulletin for Christian Scholarship* 259 268.

5.6.3 THE PARTICIPATORY DECISION-MAKING APPROACH

Social tenure models call for participatory information gathering and for support of private regulatory structures. Offering households a tool to decide their own land tenure future speaks into this aim. As Siegele notes, there is a need for “government decision-makers to open the door to the room where decisions are being made, and make a place at the table where they are being discussed”.⁴²⁶ Currently government decision-makers in effect decide matrimonial property regimes for the poor. The decision in favour of the default in community of property system is made from the top down. As Sjaastad and Cousins note, it cannot be assumed that “local social contracts are homologous in their core characteristics” raising the question of how the legal system needs to adjust to “accommodate the diverse principles that inform extralegal systems”.⁴²⁷ Cousins’ point is well made that “the composition of households and families needs to be taken into account in defining land rights, and women who are household members, but not necessarily spouses, must also be considered”.⁴²⁸ This consideration is addressed in the template in its approach to diversity and dependents, whose housing rights are extremely strong.

5.6.4 SUCCESSION AND DISPUTE RESOLUTION

Prenuptial contracts are the only legal construct in South Africa that allows for an irrevocable succession agreement. This legal loophole is taken advantage of in the template agreement, in the interest of both the spouse and the dependents. This is achieved in a manner whereby dependents cannot be disadvantaged. Land documentation such as this (that can be used to prevent land grabbing by relatives) is a benefit.⁴²⁹ The facilitation of fair succession processes for the poor is a core tenure need. As Kingwill notes:

The motive of heirs who sell family property is often to settle debts with local moneylenders, rather than to obtain the property for themselves.

⁴²⁶ L Siegele “Procedural Rights: Inclusion in Decision Making Processes Relating to Land and Natural Resources” (2008) in *Legal Empowerment In Practice* 123 124.

⁴²⁷ E Sjaastad & B Cousins “Formalisation of Land Rights in the South: An Overview” (2008) 26 *Land Use Policy* 1 6.

⁴²⁸ B Cousins “Embeddedness” Versus Titling: African Land Tenure Systems and the Potential Impacts of the Communal Land Rights Act 11 of 2004” (2005) 3 *Stell LR* 488 507.

⁴²⁹ Van Asperen *Innovative Land Tools* 236.

These cases result in conflict and emotional confrontations between family members. Those threatened by eviction invariably seek legal assistance and are confused to discover the law cannot help them. Cases such as these provoke legal dilemmas, since there is no ‘law’ that lawyers can draw from to stay these sales, and they are unfamiliar with the strength and meaning of local norms.⁴³⁰

A prenuptial agreement reflects personal, rather than State norms. However, by virtue of the fact that marriage is a public status, couples do not have unlimited freedom to contract. Legal norms based on public policy must be taken into consideration when agreeing the terms of a prenuptial contract.

As Bromley notes, formal titles present the poor with the need to decide “whether to exchange their current embeddedness in one community for an uncertain embeddedness in another community. In the absence of reasonable assurance that the new community (the government) can offer more effective protection than the current one, the switch is not obviously superior”.⁴³¹ Couples might find such assurance in a prenuptial contract, offering as it does the opportunity to express their own tenure succession desires. Interestingly, in a 2012 Cape Town study, Muyebe and Seekings found that the family group often becomes the unit of trust in low cost housing developments.⁴³² The level and sustainability of family trust could be enhanced by such agreements, particularly since agreement is reached at a point when the relationship is still functional, prior to marriage.

The need to promote socially appropriate adjudication through alternate dispute resolution is broadly recognized as a means to entrench land tenure security. The template creates the housing right for a group of individual people and some future conflict must be foreseen as inevitable. The template addresses this with clauses that are flexibly structured to keep dispute processes open for household determination, at the time they arise. While this is not commonly used in prenuptial agreements, there is no bar to including such clauses if they relate to specific property, provided they comply with general legal principles.

⁴³⁰ Kingwill (2015) *Kronos* 262.

⁴³¹ DW Bromley “Formalising Property Relations in the Developing World: The Wrong Prescription for the Wrong Malady” (2008) 26 *Land Use Policy* 20 26.

⁴³² S Muyebe & J Seekings “Homeownership, Privacy and Neighbourly Relations in Poor Urban Neighbourhoods in Cape Town, South Africa” (2012) 43 *South African Review of Sociology* 41 54-55.

5.6.5 PRIVATE OWNERSHIP VERSUS HOUSING BASED ON NEED

Cousins suggests that in the African rural environment there is a need to secure occupation and use without transfer of private ownership.⁴³³ The ownership paradigm is already a *fait accompli* in urban South African State subsidized housing. The template benefits from the strength of tenure that ownership offers, but nevertheless accepts that some registered owners may never again use the formal transfer system – since there are existing indicators that this may be so.⁴³⁴ A prenuptial contract is well suited to assist with the need to maintain deeds or title and land record management. The consequences of such reversions to informality are limited in the model prenuptial agreement, due to succession of ownership title being recorded. Provision is made for substitution of heirs (prior to vesting of ownership) thereby obviating the problems of interim transfers that are not given effect to.

While the template that is developed functions within the traditional ownership paradigm, it secures preferential rights for financially dependent parties, at the expense of the financially independent. Since a prenuptial agreement is very hard to change, the model specifies that it is financial dependants who will benefit from servitude rights, without naming them. This means that the particular person in whose favour the servitude operates can change (with the rights of financially independent automatically lapsing because they no longer fall within the definition “dependant”). In other words the model requires charity to begin at home. It also promotes the intent of the South African housing programme, as needing to be effective beyond the principal beneficiary.⁴³⁵

Pro-poor tools must defend poor household members from other family members who see land in terms of its market value, and from a perception of their entitlement for that value to accrue to themselves alone. The template in effect protects vulnerable household members from the arbitrary discretion of other family to evict them, should they fall out of favour. Accordingly, the template is not based on principles of land as a commodity, but on land as a means to satisfy housing need,

⁴³³ Cousins (2005) *Stell LR* 512.

⁴³⁴ LM Roux *Land Registration Use: Sales in a State-Subsidised Housing Estate in South Africa* (2013) DPhil thesis Calgary.

⁴³⁵ This is on the same principle of charity beginning at home, with “home” being the Nation.

with the ownership thereof aimed at securing housing based on need. While the construct developed does allow for the buying and selling of land, this is also made subject to housing need (in line with the reason for the acquisition of the property in the first place, through the State grant).

While ownership is strongly protected under South African law, it must be distinguished from the right of control in its tenure results. The current view of protecting cohabiting partners' tenure is that land should be co-owned. The Matrimonial Property Act deals with marriages in community of property and gives wives the same powers as their husbands with regard to the disposal of property, the contracting of debts and management of the estate.⁴³⁶ There are extensive provisions requiring written consent for decisions relating to immovable property that is jointly owned, many of which require attestation before two competent witnesses. But, as the *Distillers Corporation Ltd v Modise* case shows, this protection is not necessarily enough to protect a co-owner married in community of property.⁴³⁷

Current housing policy results in subsidized housing being registered in the joint names of co-habiting beneficiaries.⁴³⁸ Yet, as Varley rightly concludes, joint ownership is only meaningful if rights can be effectively exercised and ownership appropriately recorded.⁴³⁹ She notes that individual rights within the household need to be balanced with current views that group tenure is a better mechanism for low-income groups, and adds there is little research on the consequences of joint titling.⁴⁴⁰ The housing right in the template is an alternative approach to co-ownership or registration in favour of a group as a single entity. It entrenches individual housing rights in an overlapping manner, curtailing the ownership rights of sole-owners, co-owners and successors in title alike. It is well suited to protect vulnerable household members, as it does not require them to take up a decision-making role beyond their social power. The emphasis on the dependents in the

⁴³⁶ See ch 4.

⁴³⁷ 2001 4 SA 1071 (O). The case was not about land, but about a suretyship agreement. In principle, the protection methods should be effective. It should be noted that the Act is not only concerned with the rights between the couple, but also with protecting the interests of third parties who contract with spouses married in community of property.

⁴³⁸ Department of Human Settlements "Technical Guidelines" in *Housing Code* 2 13.

⁴³⁹ A Varley "Gender and Property Formalization: Conventional and Alternative Approaches" (2007) 35 *World Development* 1739 1743.

⁴⁴⁰ 1745.

template is premised on the principle, as Goodwin puts it, that “individual rights being subordinated to group rights is strongly correlated with survival”.⁴⁴¹

Multiplication co-ownership of subsidized housing is inadvisable, in view of transfer complexities and costs, more exposure to multiple deceased estates, heightened dispute potential and problematic use issues. The template accordingly focuses on retaining simple sole ownership within a paradigm of multiple housing rights, as opposed to multiple ownership rights. This also means that the ownership title record is much more easily maintained in the Deeds Registry, dealing with one of the issues raised in paragraph 5.5.1 above for a pro-poor land tool. The template allows for the housing use to change flexibly as the household changes, without the need for these changes to be recorded in the public register.

The notion that there is a need to secure occupation and use *without transferring private ownership* – must be revisited. It is submitted that within the field of urban families and households, the opposite is true. There is a need to secure ownership *without transferring rights to secure occupation and use*. This means the primary restriction must be over the discretion of family members to oust other family members (and financial dependents in a more remote relationship than that of legal dependents). This makes the housing of needy dependents the prime responsibility of an owner of subsidized housing. From this perspective, ownership is a secondary issue, being the means to secure occupation rights against third parties unrelated to the household and family group. Ownership also becomes the protective mechanism that precludes alienation of the land for speculative purposes, free of the housing right. Communitarian interests are therefore protected within an individual ownership paradigm.

There is considerable research on kinship structures as formative for land rights, particularly in Africa, to the extent that to state this is trite. Domestic battles – and recording agreements about what is fair in this context – should therefore be seen as the cornerstone of pro-poor approaches to securing land tenure. Agreements that

⁴⁴¹ D Goodwin “Communal Land Tenure: Can Policy Planning for the Future be Improved?” *AfricaGEO Conference*, 1-3 July 2014, Cape Town (2014) 10
<http://www.africageoproceedings.org.za/?page_id=341> (accessed 22-06-2015).

ensure rights based on need – that can be empirically proven – that do not depend on the whim of the owner, could have great value. This is of course particularly important for wives and sisters who are traditionally submissive in their attitude, and the elderly and the young – be they male or female. A spread of prenuptial agreement templates would be necessary to meet the needs of different poor couples. The particular example designed in chapter 6 is for use with marriages where the property was registered in a man’s name alone in the past, or beneficiaries (often women) who attain sole title. A similar template could easily be designed for a couple with co-ownership, also entrenching the rights of dependents and determining succession.

In a 2002 article Varley warned that the eviction debates at the time overlooked the threats from “private, local sources: neighbours or family members”.⁴⁴² In 2007 she picks up on the theme again, noting that UN-Habitat acknowledges that household members do not “always share the same interests and that their relationships are not necessarily defined by consensus and cooperation”.⁴⁴³ She adds that married and cohabiting women are often left unprotected, with public policy often “unwilling to venture, as it were, beyond the front door”.⁴⁴⁴ There is much to commend in a public policy that refuses to go beyond the front door when it comes to intimate relationships. Far better for the poor to be given a tool whereby they can contractually agree how to *protect themselves* against unfair eviction, based on their own embedded norms, in a manner the State can support.⁴⁴⁵

A person’s character is greatly tested when an intimate relationship breaks down. Sadly, while it is critical that male decision-makers act as protectors of vulnerable women and children, these protective values may be abandoned once a cohabiting relationship ends. Similarly, it is not uncommon to see a will that includes a usufruct for a spouse, in recognition that children cannot always be relied upon to support

⁴⁴² A Varley “Private or Public: Debating the Meaning of Tenure Legalization (2002) 26 *International Journal of Urban and Regional Research* 449 458.

⁴⁴³ Varley (2007) *World Development* 1740.

⁴⁴⁴ 1741.

⁴⁴⁵ This is the classic “public-private” debate. South African public policy favours protection of vulnerable parties in intimate relationships strongly in the context of domestic violence, but unevenly in the context of household economics. Vulnerable parties are free to claim maintenance but not protected from the consequences of an unfair prenuptial agreement, as discussed in ch 4.

their parents, in the same way that spouses cannot always be relied upon to support each other. Premarital agreements creating clear housing responsibilities could be of great benefit when a household's relationships are under pressure.

5.6.6 “TALKING” CONTRACTS AND CELLPHONE TECHNOLOGY

A number of technological innovations to facilitate pro-poor results have been mooted. Two could be of particular relevance to prenuptial contracts when used as a land tool. Barry conceived a software system called “Talking Titles” that includes video and sound recordings as a data form for land information systems.⁴⁴⁶ Whittal looks at the utility of cellphone technology for recording data.⁴⁴⁷ Given the high levels of low literacy amongst housing beneficiaries mechanisms such as these (that can prioritize audio data collection) would be beneficial in closing margins of error based on misunderstanding of the written word.

5.6.7 AFFORDABILITY

The last and most difficult consideration for a prenuptial agreement as a pro-poor land tool is that of cost. Grassroots affordability is key. It may also be difficult to find sufficiently motivated and capable government employees to assist.⁴⁴⁸ Should this thesis show prenuptial agreements to be a viable pro-poor tool, legal aid becomes the next hurdle. It would need to include legal aid for cohabiting and dependency agreements as well. An inappropriate matrimonial property regime for a large class of subsidized housing owners must come with a heavy public cost.

Housing is one of the main pillars of the duty of support due by parents. The Children's Act deals with parental responsibilities and rights. The parental responsibility to “care” for a child includes the obligation (within available means) to provide the child with “a suitable place to live”, with this the first obligation listed.⁴⁴⁹ In addition to caring for the child (in a manner that includes a place to live) people with parental responsibilities are obliged to contribute towards the maintenance of

⁴⁴⁶ Barry et al (2013) *South African Journal of Geomatics*.

⁴⁴⁷ Whittal (2011) *PER*.

⁴⁴⁸ Zevenbergen et al (2013) *Land Use Policy* 596-597.

⁴⁴⁹ S 1(1) Act 38 of 2005.

their children.⁴⁵⁰ Notably parents are also obliged to “administer and safeguard the child’s property and property interests”.⁴⁵¹ There is therefore a duty on those with parental responsibilities to house and maintain children in accordance with the legal allocation of these duties.

The cost effectiveness of the State enforcing private support rights and claims to housing (as opposed to State grants meeting this need when private support cannot be effectively claimed) is therefore relevant. A 2002 study considered the cost to the State if it does not ensure the smooth running of the private maintenance system to protect children’s rights to support in South Africa.⁴⁵² The setup cost of a fully functional system (using maintenance investigators) was computed at approximately R405 million, being an increase of R170 million, taking into account existing resources. The figures were based on an assumption of between 100 000 and 400 000 new maintenance applications every year, with the average monthly maintenance payment being R300.⁴⁵³

The cumulative funds moving to carers of children from maintenance payments were computed by the 2002 study as between R3.6 and R14 billion per year, based on the assumed annual applications. This was compared with the amount of child support grants paid at the time, which was R3.5 billion. The cost of the system therefore represented 4% of the total amount the system moves. The recurrent cost per case to achieve this end was computed at R1 500. The report also notes smooth functioning of the maintenance system would also result in reducing pressure on the welfare grant system and may have benefits in reducing family violence and child criminality. This example illustrates that the cost of a social intervention should be considered in balance with their effectiveness for other direct and indirect savings.

The cheapest prenuptial contract advertised on the internet by a Cape Town service

⁴⁵⁰ S 18(2)(d).

⁴⁵¹ S 18(3)(a).

⁴⁵² *A Baseline Cost Study on the Appointment of Maintenance Investigators in Terms of the Maintenance Act, 1998 (Act no 99 of 1998)* (2002) 14-17.

⁴⁵³ The State also provides considerable maintenance to the poor by means of the child support grant and other grants.

provider is R950.⁴⁵⁴ It is the researcher's view that it would be feasible to offer pro-poor prenuptial contracts at a fee of under R1 500 in a clinic environment, given their added complexity. The cost should be analysed on the same considerations as the study on the general maintenance system above. The costs to the State arising from housing disputes and evictions are hard to quantify – they go far beyond the parental duty of support. Costs are also incurred in the numerous State processes that rely on record keeping and proof of status, like court hearings, the winding up of deceased estates, the collection of government rates and the awarding of grants and subsidies. State funding (based on a means test) for such contracts for the poor is therefore appropriate and advisable. A fictional life history is narrated below, to illustrate the continuum from informal to formal in subsidized housing. It is also used to illustrate how the private duty of housing support can be undermined, halting the flow of private benefits to children and thereby triggering the maintenance cost issues raised above.

5.7 FICTIONAL LIFE STORY

As with prior fictional life stories, the content of this story is largely based on a fictional combination of directly or indirectly reported facts encountered in the researcher's past. The references to State administration and conveyancers are also fictitious and not based on the researcher's direct experience.

Our story's protagonist, Hope, is a domestic worker who is awarded a housing subsidy. She completes a valid State-to-beneficiary sale agreement for a house, according to the normal procedures, whereby the State uses the subsidy to pay for the building of the house. There are problems with the consents required for the consolidation of the mother erf of the housing development. The developers nevertheless go ahead with the building of the houses, due to a legitimate desire to ease pressure of housing demand for the poor. The beneficiaries are given occupation, but registration of ownership is delayed due to the mother erf problems.

⁴⁵⁴Law2ticks: Notarial & Legal Services n.d.
 <http://www.law2ticks.co.za/antenuptial.html?gclid=CjwKEAajw7YWwBRCThIyogcGymQsSJAAmz_ndLmE5kbrXOwYVP6paoVoIYC8o7zP_QVxhULsBnZZ3oRoCT5Lw_wcB> (accessed 25-05-2015).

While the housing department does not dispute Hope's claim, they are unable to give her a copy of the sale agreement. They say it has been sent to the conveyancers, who in turn say they have not received it. The conveyancers reassure Hope it is not a problem, as her name is on their list of transfers to be registered, and they have a power of attorney to sign the transfer papers on Hope's behalf. At the time of the housing subsidy application Hope applied as a single applicant with financial dependents. In her application she confirmed that her mother, her deceased sister's child and her own child were her dependents. At the time of writing her mother and both children are still dependent and Hope has a second child. Hope's sister's child is not formally adopted or fostered. Hope is now diagnosed as having HIV/AIDS. Love, the father of her second child, with whom Hope previously cohabited in a "vat en sit"⁴⁵⁵ relationship, now has a job with medical and pension rights, but does not own a property. She approaches him to assist with supporting the children. He advises her that he has also been diagnosed as having HIV/AIDS. They decide to marry and agree he will move in. Hope favours civil marriage and multi-generational household living. She does not understand the in community of property consequences of marriage and does not write a will.

Hope dies before transfer is registered. No one reports her estate and it is not wound up. Hope's ownership is not yet registered. Love's health is failing and – with no income – the household is in dire need. Hope's mother sells the property informally, at half the price of what it cost the State to provide it. She uses half the money to pay outstanding debts. The buyer, a local entrepreneur, is building up a portfolio of multiple rental properties. He informally evicts the household and rents the house to a tenant who is unaware of the history of the property – and is not on the housing waiting list. The first registration of ownership in Hope's estate is still not registered.

The above story reflects informal practices and record keeping issues that periodically impact on the land administration system. While this degree of complexity is not the norm, the problems will be familiar to those working in this environment. The issues in the simulated life history can be summarised as follows:

⁴⁵⁵ "Take and stay" is a colloquial term for living together in a cohabiting relationship.

- Due to pressure for housing the State (with the poor's interests at heart) allows houses to be built before the township is *formalized*.⁴⁵⁶
- Formal individual registration is delayed due to the *informal* State approach and the ensuing delays in proof of ownership being acquired.
- Seeing the problems looming, the conveyancer (meaning well) uses a signing practice that could facilitate transfer irrespective of changes in Hope's health. In other words it is an *informal* strategy.⁴⁵⁷
- The deceased sister's daughter is *informally* fostered, meaning she has no proof of formal dependency.
- There is no will proving Hope intended her heirs to be her financial dependents. This leads to the fixed *formal* intestate succession rules that clash with the actual construction of the household.
- Hope's estate is not reported. This means no executor is appointed and there is accordingly no *formally* accepted entity for the State to deal with in respect of the transfer of ownership.
- This is a blessing in disguise, in view of the fact that Love, who is about to die, will inherit the property in full (the spouse's intestate share).
- Love's succession to title means that from Hope to the ultimate heirs three *formal* intervening transfers are required, with the legal fees (from the poor's perspective) equivalent to a king's ransom.
- Alternately, after the first transfer to Hope's estate the Master of the High Court can be approached to use the simplified *formal* process.⁴⁵⁸ The time State officials will need to spend on the file will (from the taxpayer's perspective) cost the State the equivalent of a king's ransom.
- The Master of the High Court will advise that the property vests in Love's estate, leaving Hope's mother and niece with no intestate rights. Subsidized land grabbing by Love's other children is made legally possible by other relatives who could already have housing.
- A well-meaning housing official who finds the missing sale agreement before transfer is likely to be led into temptation: An *informal* tearing up of the sale

⁴⁵⁶ For a discussion of State informal practices see Varley (2002) *International Journal of Urban and Regional Research* 453-455.

⁴⁵⁷ Normal formal procedures require an updated status affidavit with the transferee's signature.

⁴⁵⁸ S 18(3) Administration of Estates Act 66 of 1965; GN R920 in GG 38238 of 24-11-2014.

agreement (to substitute Hope's mother as the beneficiary) is the easiest way to prevent a travesty of justice being perpetrated by the *formal* law.

- The above issues are however no longer relevant at grassroots. The interim *informal* sale (before the first registration of transfer) results in rights being transferred *informally*. Downward-raiding is accomplished by the entrepreneur whose aim is to build a low-cost housing portfolio.
- The tenants of the entrepreneur are renting *informally*, as the entrepreneur has no *formal* rights to the property. This means irrespective of deposits and rental paid, the tenant is open to *formal* eviction.
- Hope's dependents have lost their housing right contrary to the State's intentions at the time of housing grant. This is also a loss to the State, not currently noted in any record, due to the record keeping approach that only monitors individual ownership rights.

The stage is thus set horizontally for both household and third party conflicts over rights. It is also set vertically for the informal system to come into conflict with the formal State legal system. Whether Hope chooses informal cohabitation or formal marriage before she dies is critical. The tenure consequences of having a marriage certificate are profound. The legal cost of resolving the dependents' problems is not analysed. There is almost nothing a lawyer could do to assist them. If they could afford it, Love's heirs could evict the buyers. The law would back the heirs, provided the estate was reported and an executor appointed. This would, however, in no way help all the members of the original household the State set out to assist.

5.8 CONCLUSION

This chapter sought to link the research to current tenure debates. Chapter 6 designs a pro-poor template process for testing and chapter 7 undertakes applications. The most important concept arising out of this current chapter is that the prenuptial contract is reflective of social relationships. As such it is important as an innovative land tool for use with social tenure models. In a recent Human Sciences Research Council publication, *Family Ties, Blood is Thicker than Water*, attention was drawn to the fact that kinship support systems and assistance is still widespread in South

Africa.⁴⁵⁹ Their research shows much intergenerational solidarity, with black communities showing a higher incidence of support than white communities. Interestingly they add that economic affluence is not a determinant, and that – in fact – the more affluent people are, the less they give multiple forms of assistance.⁴⁶⁰ The poor face much greater stressors within their kinship and household groups. The template may offer a tool to contractually agree protective terms for the weak that might even surpass – and shame – the terms agreed by the affluent strong.

⁴⁵⁹ S Gordon, B Roberts & J Struwig “South African Social Attitudes Survey” (2013) 11 *HSRC Review* 17.

⁴⁶⁰ 19.

CHAPTER 6
DEVELOPMENT OF A TEMPLATE
PRO-POOR PRENUPTIAL AGREEMENT

Note to the reader/viewer

This art image has been removed pending copyright approval.

To view the image on the internet please use:

The artist's name: "Gerard Sekoto"

and

The title of the painting: "Jazz Band"

JAZZ BAND

Gerard Sekoto

1939-1993. Lived for a period in District Six, Cape Town

6 DEVELOPMENT OF A TEMPLATE PRO-POOR PRENUPTIAL AGREEMENT

*In a recent housing file an affidavit was handed in with the following statement by the [informal] caretaker of a [non-biological] child: “I have no ambition of abdicating her. I literally bind myself to provide for her as long as it takes. That's all I would like to furnish”.*⁴⁶¹

Urban Pro-Poor Registrations: Complex-Simple

6.1 INTRODUCTION

An outline of potential subsets of social issues has been tabled in chapter 3. An attempt will now be made to correlate these subsets with clauses for a pro-poor prenuptial agreement for subsidized housing, to test its viability. Sekoto’s painting, *Jazz Band*, focuses the mind on jazz as a genre that promotes individual and group improvisation and experiments with the displacing of conventional musical rules, before coming together as one *oeuvre*. A standard model template must now be designed that is sufficiently open ended to leave space for individual couples to improvise according to their own norms, including displacing some conventional formal approaches. This chapter will begin with a brief discussion of a recently raised perspective about the law functioning as process. In the face of this concern this will be followed by a preliminary outline of the steps for the registration of pro-poor prenuptial agreements, in the context of standard contract use. This will include an attorney’s client affidavit, a consultation process and the compilation of prenuptial clause templates, with the emphasis on form, rather than content.

The quotation about the housing affidavit above continues: “[T]his quaint statement indicates both a brave attempt to deal with the obfuscation of the law, while at the same time stating succinctly the most salient problem for registrations emanating from a housing department, namely that such an affidavit is all that housing beneficiaries ‘would like to furnish’”.⁴⁶² Situating itself within this problem, the

⁴⁶¹ L Downie “Urban Pro-poor Registrations: Complex-simple the Overstrand Project” (2011) 14 *PER* 119 144.

⁴⁶² 144.

approach taken will be that the prenuptial agreement must aim to be legally useful at each stage of the process. Poor clients should be able to benefit from every proactive step they take, even if they do not marry or register the contract. The chapter concludes with comments on contractual advantages and disadvantages that emerge.

6.2 LAW AS PROCESS

In a 2013 article in *Marriage, Land and Custom: Essays on Law and Social Change in South Africa*, Cousins warns that to understand the impact of rules in any society, regard must be had to “processes of regularisation and situational adjustment, within a fundamental condition of indeterminacy”.⁴⁶³ A prenuptial contract must speak into the indeterminacy of a couple’s future. It is unknown at the time of drafting what challenges the couple will have to overcome or how the couple’s commitment to the relationship will fare as a result. This uncertainty is acknowledged in one widely used wedding vow, by the inclusion of the words “to have and to hold from this day forward, for richer for poorer, for better for worse, in sickness and in health”.⁴⁶⁴ In addition to this temporal uncertainty, all marriages must ultimately end either in death or divorce, and the consequences of this must be anticipated. The formalization by marriage of a new property regime therefore offers an example *par excellence* of imposing legal rules to adjust a situation of informal cohabitation (within a condition of fundamental indeterminacy) to regularize rights.

“Process” is used in this chapter to refer to a series of events that recur repeatedly in legal institutions, resulting in change for the clients involved.⁴⁶⁵ The law functions as a process in both the litigation and contractual sphere. Attorneys who specialize in litigation focus on processes to deal with the consequences of conflict after the breakdown of relationships. Attorneys who specialize in contract focus on facilitating agreements “before the honeymoon.” Since agreement is reached while the parties are still in a constructive frame of mind this can pre-empt future conflict,

⁴⁶³ B Cousins “Women’s Land Rights and Social Change in Rural South Africa: The Case of Msinga, KwaZulu Natal” (2013) in A Claassens & D Smythe (eds) *Marriage Land and Custom: Essays on Law and Social Change in South Africa* 73 74.

⁴⁶⁴ Church Of England *The Book of Common Prayer, 1559: The Elizabethan Prayer Book* (2011) 292.

⁴⁶⁵ For an extended definition of the different manifestations of process see S Falk Moore *Law as Process, an Anthropological Approach* (1978) 42-43; Van Aken (2004) *Journal of Management Studies* 226.

making personal contracts a necessary field of study for formalizing relationships. In the context of poverty the default in community of property regime of civil marriage results in an inflexible form of regularisation. There can be few more draconian rules than the compulsory loss of half of an individual's property (as well as liability for a partner's debt) if a couple cannot afford a prenuptial contract. This equates commitment to a spouse with the acquisition or deprivation of property, rather than a commitment to support each other as part of a desire to love and to cherish.⁴⁶⁶

With a subsidized house there is a high likelihood of other prior dependents in greater need of the security the property offers. On the other end of the spectrum, "no-sharing" prenuptial contracts are equally incapable of meeting changing personal household needs. In a 2013 article Barratt rightly concludes that – contrary to current practice – South African courts should be limiting "no-sharing" contracts in line with constitutional requirements that prohibit gendered discriminatory outcomes.⁴⁶⁷ She confirms the notion of problems surrounding indeterminacy and regularization, pointing out: "These contracts are indeed concluded behind a fundamental 'veil of ignorance': they purport to regulate all of a couple's financial affairs, until one of them dies, regardless of the unknowable vicissitudes of life".⁴⁶⁸

Formalization processes can deprive people of rights, such as the ability of individual title-holders to evict financial dependents that are not legal dependents. This critique must be taken seriously. Falk Moore's "law as process" model is referred to by Cousins as a useful analytical tool for understanding South African land tenure issues contextually.⁴⁶⁹ In *Law as Process, an Anthropological Approach* Falk Moore indicates: "A central concern of any rule-maker should be the identification of those social processes which operate outside the rules, or which cause people to use rules, or to abandon them, bend them, or re-interpret them, side-step them, or replace them".⁴⁷⁰ A pro-poor prenuptial agreement must speak into an environment with

⁴⁶⁶ While it is generally desirable for couples to wish to be team and share their assets freely, it would not be advisable for a notary to recommend this in the case of a subsidized house that might be the only asset of value for one or both of the spouses.

⁴⁶⁷ Barratt A "Whatever I Acquire Will Be Mine and Mine Alone": Marital Agreements Not to Share in Constitutional South Africa" (2013) 130 *SALJ* 688 698.

⁴⁶⁸ 694–695.

⁴⁶⁹ See Cousins discussion of S Falk Moore's *Law as Process* in "Women's Land Rights" in *Marriage Land and Custom* 74.

⁴⁷⁰ Falk Moore *Law as Process* 4.

higher than usual extra-legal and informal practices. As such it is advisable for such contracts to attempt to incorporate both “systemic regularities” and “systemic contradictions”.⁴⁷¹ Many such dichotomies are reflected in the embedded and hybrid practices discussed in chapter 3. A pragmatic stance demands such ambiguities should not be ignored.

In an article on family contracts Bonthuys expresses reservations about using contractual processes in the context of family, feeling they often entrench latent “private” inequalities, particularly for women.⁴⁷² Her focus in the article is on motivating family law rules functioning *ex lege* (by operation of law) as preferable to rules being created by contract. While she recognizes that poor cohabiting couples will not easily have access to legal advice for contracts,⁴⁷³ she fails to raise the issue of the number of poor people effectively coerced into community of property. This occurs by operation of law, precisely due to the absence of the economic freedom to contract out. She notes: “To hold that the dignity of a person who was economically or socially coerced into the agreement requires that the contract be enforced against her, is not only cynical, it is nonsensical”.⁴⁷⁴ This applies equally to courts enforcing the default matrimonial property consequences against vulnerable women (and men) coerced by operation of law into community of property.

Bonthuys does nevertheless explore the potential use of relational contract theory as a fruitful approach to family contracts, as a means to reduce inequalities. Relational approaches stress the recognition of a long-term relationship that requires co-operation, rather than imposing inflexible terms that are negotiated up front.⁴⁷⁵ South Africa does not currently use the relational approach to interpreting contracts, although there are increasing calls for its use.⁴⁷⁶ The theory is highly relevant, particularly to those couples whose worldview rests on the customary notion of people belonging to land, with rights and responsibilities based on community

⁴⁷¹ For further background on these concepts see “Uncertainties in Situations, Indeterminacies in Culture” ch 1 in Moore’s *Law as Process* 51.

⁴⁷² E Bonthuys “Family Contracts” (2004) 121 *SALJ* 879 897.

⁴⁷³ 889.

⁴⁷⁴ 894.

⁴⁷⁵ 898. See also L Hawthorne “Justice Albie Sachs’ Contribution to the Law of Contract: Recognition of Relational Contract Theory” (2010) 25 *SAPL* 80.

⁴⁷⁶ See Hawthorne (2010) *SAPL* 82-83.

belonging. On a similar theme Falk Moore makes the point that “...contractual, and technical imperatives always leave gaps, require adjustments and interpretations to be applicable to certain situations...”⁴⁷⁷ This need not be a bar to a formal pro-poor agreement. Unlike statutory law, contract is a flexible field with informal agreements often incorporating many of the formal requirements.⁴⁷⁸ Aspects of indeterminacy that do not undermine equality can be embraced. Gaps and room for adjustment and interpretation can be consciously built into a formal contract.

Pragmatism also demands that processes of regularization for the poor should not be structured in anticipation of resolution of disputes by legal institutions. In the formal context matrimonial property disputes are taken to court after the irretrievable breakdown of the marital relationship, when settlement has become impossible. Equality between spouses to secure tenure in housing “before the divorce” can depend on the ability to pay for good legal representation, with recent research showing that courts often fail to protect divorcing wives’ rights appropriately.⁴⁷⁹ Similarly a subsidized house owned by the poor is more at risk of being swallowed up by debt, or of being disposed of without retained value. This makes the right to later enforcement of a maintenance claim cold comfort.⁴⁸⁰ One of the aims of a pro-poor contractual process must therefore be to avoid the use of courts where minimal access to justice is likely to make the litigation process part of the problem.⁴⁸¹

Five processes leading up to a pro-poor agreement capable of inclusion in the Deeds Registry land information system are developed and discussed below.⁴⁸²

⁴⁷⁷ Falk Moore *Law as Process* 39.

⁴⁷⁸ Informal transfers of immovable property often include the core requirement of an offer and an acceptance, but do not comply with statutory requirements that the agreement be fully in writing.

⁴⁷⁹ E Moore & C Himonga *Protection of Womens Marital Property Rights at the End of a Customary Marriage: A View from Inside and Outside the Courts* CSSR Working Paper No 350 (2015) 22 <<http://cssr.uct.ac.za/pub/wp/350/>> (accessed 1-07-2015).

⁴⁸⁰ See Van der Merwe “A Helping Hand for Disadvantaged Divorce Litigants: An Analysis of the Implications of MG V RG” (2014) 131 *SALJ*.

⁴⁸¹ See D Holness “Recent Developments in the Provision of Pro Bono Legal Services by Attorneys in South Africa” (2013) 16 *PER* 129.

⁴⁸² It must however be noted that, for many, a willingness to move away from formal titling processes is seen as necessary. See B Cousins “Embeddedness” Versus Titling: African Land Tenure Systems and the Potential Impacts of the Communal Land Rights Act 11 of 2004” (2005) 3 *Stell LR* 488 489.

6.3 THE USE OF LEGAL TEMPLATES

The first process to be noted is the notarial practice of using electronic templates as the starting point for a prenuptial contract. There is no prescribed form for notarial deeds, with notaries working largely from template precedents.⁴⁸³ Templates may be seen by some as lacking sufficient depth to apply our sophisticated legal system to complex social needs. For the pragmatist the important point is that the use of templates is a fact of legal life.⁴⁸⁴ Their wide use is what makes a critique of the emphasis of such templates fruitful.⁴⁸⁵ As Nortje notes, the “focus of regulation should be on content control of unfair terms in standard contracts”.⁴⁸⁶ Good templates can be a key strategy for enabling the legal system to manage the complex task of being simple enough for general use. Most of the debate around standard contract use is in the context of large corporates like banks and insurance companies. Different considerations apply with pro-poor interventions where the budget for legal advice (whether public or private) is likely to be limited.⁴⁸⁷

Various types of templates are electronically available. A template status affidavit is used as part of the transfer of ownership process. A marital status affidavit must also be obtained by a notary as part of the process of registering a prenuptial contract.⁴⁸⁸ *Lexis Nexis Online* (South Africa) is the mainstream electronic platform for template forms and precedents.⁴⁸⁹ Some of the forms and precedents in the *Lexis Nexis* collection also include template checklists for practitioners, as a guide for the first consultation. Checklists are a reminder of the questions the client needs to be asked before the lawyer uses the template. The *Lexis Nexis* collection does not have a checklist for a prenuptial contract, only a checklist for a partnership agreement.⁴⁹⁰

⁴⁸³ JO Christie *Conveyancing Practice Guide* 3 ed (2008) 132.

⁴⁸⁴ L Hawthorne “The ‘New Learning’ and Transformation of Contract Law: Reconciling the Rule of Law with the Constitutional Imperative to Social Transformation” (2008) 3 *SAPR/PL* 77 89.

⁴⁸⁵ K Hopkins “Standard-Form Contracts and the Evolving Idea of Private Law Justice: A Case of Democratic Capitalist Justice Versus Natural Justice” (2003) 1 *TSAR* 150 155.

⁴⁸⁶ M Nortje “Of Reliance, Self-Reliance and Caveat Subscriptor” (2012) 129 *SALJ* 132 152.

⁴⁸⁷ For a discussion of the cost implications see Hopkins (2003) *TSAR* 154.

⁴⁸⁸ Christie *Conveyancing Practice Guide* 134.

⁴⁸⁹ *Lexis Nexis Forms and Precedents Online*

<<http://www.mylexisnexis.co.za.ezproxy.uct.ac.za/Index.aspx>> (accessed 08-07-2015).

⁴⁹⁰ An example is included in app C 237 below for reference purposes.

Lexis Nexis currently has only two template prenuptial contract precedents, with a few additional clauses for optional insertion. At date of writing it has no precedent for a partnership agreement, perhaps in recognition of the fact that the prenuptial contract template can easily be customized for use as a partnership agreement. The one prenuptial contract precedent is for a total “no-sharing” prenuptial contract and the other for a standard accrual contract.⁴⁹¹ The accrual prenuptial contract is now so widely used that it can be considered the standard contract. This suggests the *Lexis Nexis* accrual template is being very widely used when prenuptial contracts are registered. The *Lexis Nexis* partnership agreement checklist and accrual prenuptial agreement template are included in the appendices. They can be used as a point of reference to compare the differences with the model pro-poor process being developed.

The *Lexis Nexis* prenuptial contract precedents are very basic, such that practitioners would need to modify them to provide for any unusual terms, such as those required for a pro-poor approach. In practice these precedents would be used as the preliminary point of departure, before drafting a final contract according to client needs. It is customary for legal practitioners to build up an internal collection of such customised precedents, for repeated use. They usually do this for their own individual practice, according to their client profile. With larger firms some of these precedents are included in a database, for use by the legal practice as a whole. These general precedents are then upgraded over time, as applications of the precedent draw attention to the need for change, either for legal or practical reasons.

The scope of this thesis only allows for a preliminary exploration of a pro-poor template precedent process. Accordingly a notaries’ template is designed, of the type that might be internally drafted – as a first stage – by a single practitioner with many poor clients. A participatory approach is taken to the drafting of the templates for this thesis, with the researcher designing the model based on her own prior experience as a notary and consultant to a housing department.⁴⁹² In chapter 7 the

⁴⁹¹ An example is included in app D 239 below for reference purposes.

⁴⁹² For a further discussion of the use by professionals of design knowledge and technological rules see JE Van Aken “Management Research Based on the Paradigm of the Design Sciences: The Quest for Field-Tested and Grounded Technological Rules” (2004) 41 *Journal of Management Studies* 219 226-228.

template is subjected to preliminary testing, to pave the way for peer review by other notaries and for further critical assessment (in later research).

6.4 TEMPLATE PROCESSES

6.4.1 THE CHECKLIST STAGE

In terms of process a template checklist is therefore the first step for evaluation. The *Lexis Nexis* partnership agreement checklist gives an indication of what can be included in such checklists. Poor clients have very different needs. Systemically it would be helpful for legal advice to the poor to be a legal specialization with the poor able to access such services. This is unfortunately not the case. Accordingly, in order to equip legal practitioners to correctly identify the needs of poor clients, it is imperative to correlate a checklist with the kinds of social issues raised in chapter 3.

A checklist is a practical, cheap and user-friendly way to bridge gaps in a notary's experience. As the *Lexis Nexis* checklist shows, the approach to such questions is factual, rather than legal. Processes for the poor need to rely more heavily on less skilled facilitators and paralegals. The easier parts of a checklist could be made publically available, for poor clients to think through the issues before seeing a lawyer. This would give greater control to the client and de-mystify the role of the lawyer and the law. A first set of provisional questions will be explored, in the form of answers for an affidavit. It is framed in a manner that could be handled by a paralegal or person specifically trained to assist with such affidavits.⁴⁹³

For brevity's sake a checklist has not been compiled for the second half of the process, namely the more complex contract, succession and arbitration aspects. The questions for this section would not be easily handled without the assistance of a fully trained legal advisor. The checklist questions for this part should essentially create an appropriate opening for poor clients to discuss any of the social subsets that apply to their own housing context. As Trakman notes, there can be problems with

⁴⁹³ As noted in L Cotula "Legal Empowerment to Secure Land Rights - Defining the Concept" (2008) in L Cotula & P Mathieu (eds) *Legal Empowerment In Practice: Using Legal Tools to Secure Land Rights in Africa* 7 12, there is increasing use of paralegals and community legal literacy trainers in many African countries.

applying a checklist of the classical requirements for the formation of a contract, in that “they are likely to exclude plural values which they construe as operating external to that checklist”.⁴⁹⁴ The checklist would therefore need to be compiled in a manner that alerts the notary to issues of pluralism.

6.4.2 THE AFFIDAVIT STAGE

Poor housing beneficiaries use affidavits extensively to record important matters such as informal sales, despite such affidavits often not including all the information required for a valid sale agreement.⁴⁹⁵ A number of affidavits are also used as part of the waiting list process (when people apply for a housing subsidy) to confirm economic and cohabiting status, as well as the truth of the facts in the application.⁴⁹⁶ They are therefore a known mechanism, both in the public and the private sphere. The presence of an oath adds solemnity and moral weight to promises of future performance. This wide use and acceptance makes an affidavit an appropriate pro-poor way to initiate the discussion of prenuptial terms to be agreed.

A preliminary affidavit cannot, however, be used without reservation. Pragmatism demands recognition of the possibility that (in the case of prenuptial agreements for the poor) the affidavit step may be more relevant than execution and registration of the agreement itself. The informal affidavit practices of the poor often regard subsequent formal steps as less important. This means that such an affidavit may well be used independently to facilitate local, extra-judicial enforcement of the agreed contents. The choice in this thesis of an affidavit to initiate a pro-poor prenuptial agreement checklist is premised on this possibility. Contemporary tenure thinking recognizes the need to support respected extra-judicial enforcement processes wherever appropriate.⁴⁹⁷ As Hawthorne notes, hidden sub-culture can be a “powerful enforcement mechanism based upon social approval and various codes of conduct typical of particular contracts”.⁴⁹⁸ For this reason considerable care would

⁴⁹⁴ L. Trakman “Pluralism in Contract Law” (2010) 58 *Buffalo Law Review* 1031 1047.

⁴⁹⁵ B. MacNab “Beyond Housing Provision: Strengthening Emerging Property Markets” July/Aug (2011) *SA Affordable Housing Magazine* 1-9.

⁴⁹⁶ Department Human Settlements “Technical and General Guidelines” *Housing Code 2* (2009) 14-15.

⁴⁹⁷ See ch 5.

⁴⁹⁸ Hawthorne (2010) *SAPL* 85.

have to be taken over the contents of such affidavits, with support offered to the poor and a variety of good template affidavits being available.

Legal and para-legal support should recognize that such affidavits might have to work incrementally towards formal registration of a pro-poor prenuptial agreement, rather than assuming immediate registration. Current tenure thinking encourages the use of incremental processes.⁴⁹⁹ The likelihood of some affidavits being signed without the incremental steps (of marriage and registration following thereafter) should be anticipated and built into the process. The affidavit could potentially be construed as proof of a cohabitation contract, if it states it is intended to have immediate effect. Such an approach could assist considerably with the clarification and enforcement of ownership and housing rights.⁵⁰⁰ An affidavit constituting a contract in its own right raises its own complex issues and cannot be traversed further in this thesis. The template below is not therefore drafted to deal directly with this possibility.

Standard affidavit templates normally confirm matters such as identity, marital status and place of residence. It is envisaged that a prenuptial agreement affidavit would go further to incorporate some core aspects of the agreement. Notaries will readily see that a consultation driven by the points for attestation (in the affidavit below) results in the need for a very different spread of legal advice.

Cognizance has been taken of lower than usual levels of literacy and of educational disadvantage. Since only the *concepts* underlying the drafting of such a questionnaire are being explored for the affidavit at this point, a plain language conversion has not been undertaken. Plain language translation would also be necessary into the official language most commonly used by the community being assisted.

⁴⁹⁹ Payne G & A Durand-Lasserve “Holding On: Security of Tenure - Types, Policies, Practices and Challenges”: Research Paper prepared for the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik, to inform her Study on Security of Tenure 22-23 October 2012 (2013) 3 <<http://www.ohchr.org/Documents/Issues/Housing/SecurityTenure/Payne-Durand-Lasserve-BackgroundPaper-JAN2013.pdf>> (accessed on 18-07-2015).

⁵⁰⁰ See T Schwellnus “Co-habitation” in *Butterworths Family Law Service* (2014) 12 and 21 for a discussion of the possible content of cohabitation contracts with regard to the common home.

PRECEDENT AFFIDAVIT

Precedent A: AFFIDAVIT CONFIRMING INTENTION TO ENTER INTO A PRENUPTIAL AGREEMENT FOR SUBSIDIZED HOUSING OR LAND

For use when:

- There is a single beneficiary with rights to sole title, or the couple are both beneficiaries with rights to joint title
- The sale agreement to acquire the subsidized housing or land has been signed, or ownership is registered, or the affidavit signatories are still on the housing waiting list

I the undersigned: _____ Solemnly under oath declare:

CONFIRMATION OF IDENTITY, MARITAL STATUS AND HOUSING DEPENDENTS
(Relevant to social issues a, b, c, d, e, f, n, o and p)

1. My full name, identity number and date of birth is as stated in the attached identity document.
2. I am single and not party to an existing marriage for which a marriage certificate has been issued. My divorce order is attached if applicable.
3. I am not party to an existing religious or customary marriage for which no marriage certificate has been issued.
4. My proposed spouse is not (to my knowledge) party to an existing religious or customary marriage for which no marriage certificate has been issued.
5. I confirm that the housing subsidy was/will be given by the State to benefit the housing beneficiary and the dependents listed below, as well as future dependents.

a _____	b _____
c _____	d _____
6. I agree the dependents listed in 5 above must have the right to live on the property for as long as they are financially dependent.

CONFIRMATION OF FORM OF MARITAL INTENTION
(Relevant to social issues g and h)

7. I wish to enter into a civil marriage under the Marriage Act or the Civil Union Act.
8. The right to enter into a customary marriage under the Customary Marriages Act has been explained to me.
9. I either do not meet the requirements for use of the Customary Marriage Act or do not wish to make use of the Act.

CONFIRMATION OF NATURE OF RIGHT TO SUBSIDIZED LAND OR HOUSING
(Relevant to social issues i, j, k and l)

10. I have a right to land or housing obtained with the assistance of a subsidy as in the attached:

Sale agreement: Yes/No	Title deed: Yes/No
------------------------	--------------------
11. I do not have a current right to subsidized land or housing. I wish my prenuptial agreement to deal with me possibly acquiring such a right. I **am** on the housing waiting list and have applied to be a:

Sole beneficiary: Yes/No	A co-beneficiary with my fiancée: Yes/No
--------------------------	--

I **am not** on the housing waiting list but may apply later: Yes/No
12. I confirm I have not entered into a written agreement disposing of any right I have to the subsidized land/house described above. I have not sold it or donated it to anyone.

CHOICE OF MATRIMONIAL PROPERTY REGIME
(Relevant to social issue m, q and r)

13. I wish to and enter into a prenuptial contract that **includes** in community of property and profit and loss, but **excludes** the subsidized house/land from the community of property and profit and loss.
Or
14. I wish to **exclude** in community of property and community of profit and loss and enter into a prenuptial contract with the accrual system of chapter 1 of the Matrimonial Property Act 88 of 1984 **and** I agree the subsidized property must be included in the statement of initial assets of the spouse who owns it, so it will be **excluded** from the effects of the accrual.

The precedent affidavit comprises the following subsections:

- Identity, marital status, dependents (social issues a, b, c, d, e, f, n, o and p)
- Form of marital intention (social issues g and h)
- Nature of right to subsidized land or housing (social issues i, j, k and l)
- Choice of matrimonial property regime (social issues m, q and r)⁵⁰¹

The affidavit questions surrounding marital status raise the need for either divorce or a polygynous customary marriage if there is a prior unregistered spouse. Couples need to be fully advised of the three marital statutes and of rights to a customary marriage. The current freedom to enter into a civil marriage without such an educational process is likely to result in many couples choosing the wrong marriage statute. Considerable conflict could result in this regard from clashes in cultural understanding due to an incorrect choice of marriage type. This means the correct choice of marital statute is the first pre-emptive step a prenuptial agreement needs to consider in the process of regularization. Sadly, a couple that intends to defraud a prior wife may not hesitate to perjure themselves in an affidavit. However, the same holds true for the utility of all affidavits.

Not all dependents have easy access to records showing who was named as dependents when the applicant beneficiaries applied for housing. Since dependents are defined as financial dependents, they are not necessarily the same as intestate heirs. Dependents may include others who are not biologically related but are economically dependent on the applicant beneficiary. The absence of an easily accessible record base of dependents makes it very difficult for dependents to protect themselves (or for the legal system to protect them) should the applicant beneficiary or title-holder wish to act to their dependent's disadvantage. This is a vast field, which cannot unfortunately be traversed in this thesis. The creation of an extra record through a prenuptial agreement affidavit could therefore serve as *prima facie* proof of the dependents' right to housing tenure security.⁵⁰² If so, this would have numerous benefits, both private and public, and could be part of an incremental

⁵⁰¹ The social issues can be found in Table 2 62 above.

⁵⁰² Formal documents are always only *prima facie* (on the face of it) proof of their content. Their accuracy can therefore be challenged in court if evidence to this effect can be proven.

process to expand land information data.

The documents attached to the affidavit are a critical step. Private land registration is highly dependent on documentary processes.⁵⁰³ Low literacy, second language issues and educational disadvantage result in an inability to fill in forms and failure to obtain government documentation. This leads to diminished protection of tenure security that is based on ownership. A housing beneficiary has to submit various formal documents as part of the application process. A proposed spouse who was not included amongst the applicant's dependents in a past housing application would not have provided these documents. Added to this is the problem of the documents of the beneficiary and dependents changing (due to changes in personal circumstances) without records being updated. Problems relating to formal documentation contribute to making justice inaccessible. This occurs both in the absence of documentation, as with an unregistered customary or religious marriage, or with the presence of inaccurate documentation, as with title deeds registered only in the name of a man married in community of property.⁵⁰⁴ The formal legal rules provide that transfer of ownership in such contexts without the wife's consent is not a valid transfer.⁵⁰⁵ However, once a transfer of this nature is a *fait accompli* few really poor wives would be able to correct the registration, due to the likely litigation and conveyancing costs.

Obtaining details of the nature of a couple's right to subsidized housing is an equally important step. Low-literacy and educational levels can result in the belief that various written documents constitute a formal transfer of rights from the State, when they do not. There is often confusion amongst housing applicants regarding whether their land rights are enforceable and who will get title. This is exacerbated when registration of ownership is delayed over long periods, as is particularly the case with registrations under the Conversion of Certain Rights into Leasehold or Ownership

⁵⁰³ See Christie *Conveyancing Practice Guide* ch 2.

⁵⁰⁴ S 17(4) Deeds Registries Act 47 of 1937 provides for a spouse in community of property to apply to have their name endorsed on the title deed. This process is not however obligatory and is not free. In these instances it is fairly easy for the title-holder to dispose of the land without the conveyancer being aware of the marriage. The transfer would be based upon a fraudulent marital status affidavit indicating single status.

⁵⁰⁵ See ch 4.

Act that deals with old order rights.⁵⁰⁶ There is often a perception that women registered as the second co-owner are dependents, and do not have ownership rights. There can also be differing perceptions of the rights of younger brothers and whether they should have equal rights in households where an older brother applied for the subsidy. The exact rights arising out of individual and joint titles of ownership and the household and community's perception of those rights may differ. This has far-reaching consequences for a couple and their dependents intending to live in the property – a matter best clarified before marriage.

Question 12 of the model affidavit above is intended to deal with the problem of multiple intervening informal sales of subsidized housing, without registration of transfer of ownership. Undertaking the amount of legal advice needed to explain the consequences of informal sales as part of the prenuptial agreement advice would not be practicable. The “written agreement” aspect of the question regarding informal sales in the affidavit therefore limits it to disposals that would potentially fulfil the writing requirements of the Alienation of Land Act and Matrimonial Property Act.⁵⁰⁷ Such disposals normally require an intervening registration of transfer in terms of the Deeds Registries Act.⁵⁰⁸

A correctly completed affidavit with all the necessary attachments could go a long way towards protecting unsecured tenure for dependents without title rights. Note the affirmation process for an affidavit requires the signatory to confirm they know and understand the contents of the affidavit. There are strict processes for use when signatories are illiterate or do not understand the language of the affidavit. This makes the role of the commissioner of oaths very important. A rubber-stamping approach to such affidavits would be a major problem.

If a future pilot project were to test prenuptial agreements, the capacity of individuals to correctly complete such affidavits would be the first thing needing testing. The capacity of those who may assist with the process would also have to be assessed. Officials such as police are themselves often inadequately trained for the task. There

⁵⁰⁶ Act 81 of 1988.

⁵⁰⁷ Act 68 of 1981 and Act 88 of 1984.

⁵⁰⁸ S 14 Deeds Registries Act 47 of 1937.

is therefore a high risk of inaccurately completed affidavits. It is this researcher's view that this is probably the strongest argument against the effectiveness of formal contractual mechanisms to promote support of dependents. As Davis notes, our case law recognizes that many contracts are concluded in the context of illiteracy by persons "who have little bargaining power and without much understanding of the content of contracts".⁵⁰⁹ The risk of recording incorrect terms also argues in favour of recognizing the need for additional extra-legal support systems that function outside of form-filling paradigms. Nevertheless, the use of generic documents is central to any land information system, due to the need to manage high volumes of information. This would make it necessary for the formal and informal system to continue to function in parallel in this regard, to keep the door open for the poor's equal right to access formal processes.

6.4.3 THE ATTORNEY-CLIENT INITIAL CONSULTATION STAGE

Attorneys use the consultation stage to find out the client's wishes and explain available legal possibilities. The consultation model in this thesis begins with the affidavit in 6.4.2 above, which may be facilitated by a para-legal or suitably trained official. Many poor clients spend their limited funds on a legal consultation that results in the advice that legal assistance is not possible. This outcome is based largely on the answers to the questions covered in the affidavit, meaning this expense could be averted for such couples during the affidavit stage. In the research model, the first task for the attorney would be to confirm the couple understands the contents of the affidavit and its attachments. If the land right proves capable of inclusion in a prenuptial contract, the attorney would then need to confirm what terms the clients wish to agree about it.

The researcher – as a participatory pro-poor notary designing the template model – identified the following three areas (from the chapter 3 social issues) as relevant to this stage: Arrangements during the subsistence of the marriage (with cognizance taken of potential divorce); succession arrangements; and dispute resolution.⁵¹⁰

⁵⁰⁹ DM Davis "Developing the Common Law of Contract in the Light of Poverty and Illiteracy : The Challenge of the Constitution" (2011) 3 *Stell L R* 845 854.

⁵¹⁰ See issues p to z and aa to qq in Table 2 62 above.

After identifying the client's wishes in these three areas the attorney would need to explain the available choices. A prenuptial agreement is a voluntary agreement, as is every term it contains. The automatic consequences of marriage remain, however, irrespective of the couple's intention. Those most notable are the reciprocal duty of support during the marriage, the right (and duty) to occupy the marital home regardless of who owns it or who holds the lease and the prohibition on adultery⁵¹¹ (which would apply if one spouse wished a lover to move into the home). These points would need to be explicitly explained.

As housing policy currently stands people who have previously benefitted from government assistance or owned a fixed residential property are usually precluded from applying for subsidies.⁵¹² Attorneys would need to be aware of policy changes in order to advise their clients in those instances where both parties have applied for government assistance. It should be remembered that a household means test is currently part of the final award process for applicants who reach the top of the housing waiting list.⁵¹³

6.4.4 IDENTIFICATION OF EXISTING TEMPLATE CLAUSES STAGE

The template clauses are drafted specifically for use with a subsidized property in the case of marriage. A similar precedent could be used for any poor couple that owns their place of residence, or foresees they will do so in the future. It could also be customized to serve as a notarial cohabitation agreement, or for a single person who wishes to entrench real rights for dependents.⁵¹⁴ As with other consultations, it would be the attorney's duty to offer alternative advice if it is clear the template is not appropriate, and to customize the precedent to provide for minor differences.

The law spanned in the agreement includes the following fields of law: property, contract, family, sale, lease, succession, trust, mediation and arbitration. Each of these fields is a complex specialization, with sub-specializations in their own right.

⁵¹¹ The delictual action based on adultery was however abolished by the Constitutional Court in 2015.

⁵¹² Department Human Settlements "Technical and General Guidelines" *Housing Code 2* (2009) 12.

⁵¹³ Department Human Settlements "Technical and General Guidelines" *Housing Code 2* (2009) 15.

⁵¹⁴ A personal servitude such as *usus* can be used for households with dependents where there is no intimate partner, with *usus* being a personal servitude that burdens the land.

For this reason the researcher's template focuses on form above content, without a detailed legal study or overview of the legal theory underpinning the clauses. The template takes current law as a given, recognizing that content would need to change should there be a shift in legal direction. Unlike statutory law, template clauses can be changed on a quick turnaround to accommodate change. The drafting emphasis is therefore on synthesizing legal mechanisms (using both practical and legal strategies) to secure a variety of housing interests. It is not on legal theoretical depth.

The Lexis Nexis *Forms and Precedents* for the abovementioned fields of law were studied to identify relevant templates already in use, as well as which clauses are best adapted to a pro-poor precedent of this nature.⁵¹⁵ While a little wording and some of the sequences are retained, the content of the researcher's precedent varies considerably. A number of the usual formal and technical clauses are not included. It would be necessary to include them in a final precedent, mainly as an addendum.⁵¹⁶ Only the core issues for agreement and legality have been addressed. They cover those issues the attorney would need to traverse with the clients for clarity on their wishes before using the template. Most clients do not read contracts with the care they should, making it necessary to draft in a manner that prioritizes salient points.

The clauses are drafted on the assumption that attorneys with inadequate experience of the poor may need to use the template. An attempt is made to bridge this gap where possible. It is also drafted in anticipation of some clients only completing a part of the formal legal processes, before reverting to informal practices, or being unable to afford proper access to courts. Various drafting strategies are used to maintain legal relevance should this be the case, as this is profoundly important to security of tenure. The researcher is not aware of other template precedents that take this approach, but it is submitted it needs to be central to a pragmatic pro-poor approach. The template also attempts to take account of the hybrid views of culture and marriage discussed in chapter 3. Strategies to overcome barriers experienced by conveyancers are footnoted, as they are highly technical and likely only to be of

⁵¹⁵ Lexis Nexis *Butterworths Forms and Precedents Online* "Estates" "Law of Persons and the Family" "Property 1" "Property2" <<http://www.mylexisnexis.co.za.ezproxy.uct.ac.za/Index.aspx#>> (accessed 08-07-2015).

⁵¹⁶ For that rare client, namely the one who reads a contract right through.

interest to the conveyancing profession and Deeds Office personnel.

The template is partially converted to plain language to facilitate the chapter 7 interviews with housing officials, which will include junior staff. Further plain language adjustment and translation would be advisable (and, ideally, an audio recording) prior to use with clients. The template is fairly complex, with the intention being that this portion of the agreement would be attended to in consultation with a legal practitioner. Even advantaged clients have to rely on their attorney to talk them through the meaning of a prenuptial contract to explain its benefits and drawbacks.

6.4.5 PRO-POOR PRENUPTIAL AGREEMENT TEMPLATES

6.4.5.1 Precedent B: Prenuptial Contract Including an Usus Agreement for Government Subsidized Housing

Precedent B below is relevant to social issues s to w.⁵¹⁷ A brief explanation follows. Due to the fact that the legal consequences of potential relationship breakdown must be raised during the consultation, some of the wording in the identification of parties is socially, rather than legally, focussed. “Beloved” and “*Geliefde*” are used in the template to defuse the negative emotions this sometimes triggers.⁵¹⁸ The words *Umyeni/Inkosikazi* – the “Spouses” – are used to show that cognizance is taken of the fact that the Xhosa language does not include a word for the concept of a gender-neutral spouse. These words incorporate all three of the official languages of the Western Cape, namely English, Afrikaans and Xhosa.

The precedent B clauses relate only to the subsidized property. The remainder of the spouses’ estates would either fall into the accrual, or fall into a community estate, depending on which alternative the couple chooses. The explicit identification of dependents clarifies and extends the normal legal duties of housing support. As explained in chapter 4, financial dependents named by housing applicants as dependents are not necessarily the same as relatives by blood, marriage or adoption. This means they do not all have automatic legal rights to support from the adults in

⁵¹⁷ See Table 2 62 above.

⁵¹⁸ This wording was chosen after considerable discussion with others.

the household, nor to inherit from them on intestacy. The precedent therefore secures tenure for financial dependents, in addition to legal dependents. It would be against the public morals to exclude legal dependents (so they are included).⁵¹⁹

Ownership of immovable property is not transferred through contract or delivery alone, but by registration.⁵²⁰ Currently (under South African law) marriage is the only personal relationship capable of immediately vesting land ownership rights protected against third parties. In community of property marital rights are automatically protected without formal land registration being compulsory, with registration of ownership at the Deeds Office not a requirement for ownership.⁵²¹ Failure to register does not affect the validity of the co-ownership, although the practical protection of registration can be affected. This does not affect the model template, as no ownership is transferred.

The rights that are entrenched in the model are entrenched as servitudes, not ownership. The use of a notarial lease was considered but rejected, due to the fact that leases allow for less flexibility than other personal servitudes. Since a prenuptial contract is a notarial deed, it can entrench real rights in a manner that an underhand contract cannot. The template makes use of these notarial advantages to secure housing tenure by registering it as a servitude. An *usus* servitude was identified as the best type to secure tenure for subsidized housing. *Usus* gives a more limited right to occupation than the servitudes of habitation and usufruct. While offering personal rights, *usus* is also a real right burdening land and is therefore capable of being recorded in the conditions of a title deed, making it enforceable against third parties. It can be for a set period (such as financial dependency) or a person's lifetime, but not beyond their death.⁵²² It is a personal servitude, meaning the right to *usus* cannot be transferred to another person. Interestingly, in *Wormald NO v Kambule* the right to reside in a home was construed as being a "type of customary

⁵¹⁹ Contracts may not include terms that conflict with the unalterable consequences of marriage and the law.

⁵²⁰ See A Barratt "Clarifying Protection of Spouses Married in Community of Property? [Discussion of *Visser v Hull* 2010 1 SA 521 (WCC) and *Bopape v Moloto* 2000 1 SA 383 (T)] (2011) 22 *Stell LR* 272 277 for a discussion of rectification transfers and lack of consent by spouses.

⁵²¹ S 17 Deeds Registries Act. Outside of the context of marriage in community, registration is technically the mechanism by which transfer of immoveable property is effected.

⁵²² Badenhorst PJ, Pienaar JM, Mostert H & Van Rooyen M *Silberberg and Schoeman's The Law of Property* 4 ed (2004) 313; Van der Merwe *Notarial Practice* 134.

law personal servitude of *usus* or *habitatio*”.⁵²³

Usus is typically granted to an individual, with the right including occupation for their household, family and visitors.⁵²⁴ There is however no prohibition to casting it as right for a specific group of individuals. Agreements to benefit third parties (other than the spouses) are not common in prenuptial agreements, but they are allowed.⁵²⁵ The *usus* right has therefore been drafted in the model as a right shared by the spouses with the dependents (as third party beneficiaries). This gives the dependents a personal servitude in their own right. *Usus* does not give the holder the right to lease or sublease, meaning the disadvantages of too many decision-makers can be avoided.⁵²⁶ The benefits for the dependents in the template would be effective *inter se* on agreement by the spouses, but only effective against third parties on registration of the notarial contract. In other words informal use prior to registration would be capable of formal legal recognition between the parties *inter se*, if provable.

There is currently no automatic Deeds Office protection of children or dependent’s rights over land. The benefits extended to dependents in the template accord with the Bill of Rights provisions that every child has the right to “family care or parental care, or to appropriate alternative care when removed from the family environment” and to “basic shelter”.⁵²⁷ The common law “ranks” duties of support, in the order of a spouse first, then a child or indigent parent, then a grandchild or indigent grandparent and lastly a sibling.⁵²⁸ Customary law also envisages support relationships somewhat differently to the common law. The housing subsidies are based on a wider set of factual relationships than the common law relationships that give rise to automatic support duties. Accordingly the ranking in the model template differs. The template recognizes the prior need of the subsidy spouse’s dependents, since it is the household of the subsidy spouse that would have been subjected to the stringent poverty means test. The ranking of the dependents in a later template takes

⁵²³ 2005 4 All SA 629 (SCA) para 25(d).

⁵²⁴ Van der Merwe *Notarial Practice* 134 uses the word “household”.

⁵²⁵ Van der Merwe *Notarial Practice* 80.

⁵²⁶ Badenhorst et al *Silberberg’s Law of Property* 4 ed 315.

⁵²⁷ S 28(1)(b)(c) the Constitution.

⁵²⁸ This depends on the need of the person claiming support and the means of the person giving support.

cognizance of this, as well as the indeterminacy of their future financial stability, versus the financial stability of the other spouse's dependents. At common law, the support duty is affected by the "neediness" of the claimant, if there is no need there is no duty. The dependence-based claim of *usus* is similarly structured in the precedent to fall away when the dependant is no longer in need.

Tenure is further secured in the model in respect of the spouses' future land ownership, in the event the subsidized house is lost or alienated. This clause makes substitution of another property subject to the *usus* obligatory, should the couple own land again in the future. Housing tenure for all parties is secured in the face of insolvency or attachment of the property due to the owner's debts. This is possible by virtue of the *usus* right being a distinct real right that remains a charge upon the property upon transfer of ownership. A conveyancer is obliged to take cognizance of the terms of a prenuptial contract before transferring ownership of land. This means in effect that the conveyancer must include the *usus* condition in a new title deed, or ensure that it has either terminated or been legitimately waived. This does make the property much less viable for use as security for loans. However, banks are averse to loans in contexts where vulnerable householders may not be evicted.

Simple adjustments could make the template function as a cohabitation agreement with the same servitude rights. This could allow for incremental "upgrading" to a prenuptial contract on marriage, if that is the couple's intention. This would be in keeping with the view of marriage as a process, as in the case of customary marriage where there may not be a specific "moment of marriage". The land rights in such contracts would not be effective against non-contracting parties unless registered as a notarial servitude, but would be effective between the contracting parties.⁵²⁹

⁵²⁹ Van der Merwe *Notarial Practice* 81.

PRECEDENT *USUS* AGREEMENT

I

PRECEDENT B: PRENUPTIAL *USUS* AGREEMENT(For use with a single beneficiary with rights to sole title)¹

A list of the plain meaning of words is attached. Note some definitions are not usual legal meanings

1 CONFIRMATION OF THE IDENTITY AND INTENTION OF THE COUPLE

Name and ID _____ (Called the 'Beloved')

AND

Name and ID _____ (Called the 'Geliefde')

(Umyeni/Inkosikazi - called the 'Spouses')

We, the Beloved and Geliefde, wish to respect and protect the right to adequate housing for each other and our financial Dependents.² We agreed in this prenuptial agreement how this will be achieved.

WE, THE BELOVED AND THE GELIEFDE, THEREFORE AGREE:

- 1.1 We wish to and enter into a prenuptial contract (the Prenuptial Agreement) that **includes in community** of property and profit and loss
AND
Excludes from the community of property and profit and loss **the Property** that is the subject of this Prenuptial Agreement
- OR
- 1.2 We wish to enter into a Prenuptial Agreement that **excludes in community** of property and community of profit and loss and **use the accrual system** of chapter 1 of the Matrimonial Property Act 88 of 1984
AND
Excludes from the effects of the accrual **the Property** that is the subject of this Prenuptial Agreement.

2 IDENTIFICATION OF THE PROPERTY THAT IS EXCLUDED

Property in this Prenuptial Agreement means:

- 2.1 Land acquired with the help (either in part or completely) of a government subsidy and any house or buildings permanently fixed to that land³
AND
 Any land with a house built upon it with the help (either in part or completely) of a government subsidy
- 2.2 The particular Property that is the subject of this Prenuptial Agreement is identified:
 In the attached Title Deed / Sale Agreement OR
- Is land or housing as described in 2.1 that one or both Spouses do not currently have the right to own, but might in the future acquire the right to own.⁴

(Called the 'Property')

¹ Precedent B2 would be for couples with rights to joint title.

² The definition of a "financial dependent" follows the usage in the housing application process.

³ This restates the legal position that informal structures and back yard shacks are not included in the definition of immovable property.

⁴ Further clarification is likely to be necessary to distinguish types of subsidy. It would also be best to have a separate precedent for this category, to take cognizance of issues triggered by State policy relating to housing subsidy awards and dependent spouses.

3 IDENTITY OF DEPENDENTS IN THIS PRENUPTIAL AGREEMENT⁵

We agree that our Dependents are:

- 3.1 Name and ID _____ (1,2,3 etc)
(Beloved's existing financial Dependents)⁶
AND
 - 3.2 Name and ID _____ (1,2,3 etc)
(Geliefde's existing financial Dependents)
AND
 - 3.3 All Dependents named⁷ in the subsidy application as well as our other legal Dependents
AND
 - 3.4 Anyone who becomes legally dependent for housing on either the Beloved or the Geliefde during our lifetime, such as children or grandchildren not yet born, adopted or fostered
AND
 - 3.5 Independent children, grandchildren, parents or grandparents that may become financially, or legally, dependent for housing on either the Beloved or the Geliefde during our lifetime
- (Called the 'Dependents')

4 AGREEMENT TO SECURE HOUSING TENURE ON MARRIAGE

- 4.1 **Date of this agreement:** All the terms in this Prenuptial Agreement will only be legally valid once our marriage is registered.
- 4.2 **The Spouse who will be the owner of the Property**
 - 4.2.1 Whichever Spouse was awarded the housing subsidy remains the owner of the Property⁸ ('the Subsidy Spouse').⁹
 - 4.2.2 Only the Subsidy Spouse's name will be on the Title Deed as the owner.¹⁰
- 4.3 **Ownership will be subject to the duty to secure housing tenure**
 - 4.3.1 The Subsidy Spouse agrees to secure housing tenure in the Property for the other Spouse ('the Other Spouse') and our Dependents.
 - 4.3.2 The Subsidy Spouse agrees to secure this tenure from date of marriage.
 - 4.3.3 We agree the Subsidy Spouse must do this by giving the Other Spouse and our Dependents the legal right called *usus*.
- 4.4 **Housing tenure will be secured by the right of *usus* as explained below**
 - 4.4.1 The Other Spouse must have the right to use the Property for housing for their lifetime, with the Subsidy Spouse.
 - 4.4.2 The Dependents of the Subsidy Spouse must also have the right to use the Property for housing, for as long as they are financially dependent.¹¹

⁵ This would constitute *prima facie* proof of acceptance of the duty of housing support going beyond the legal duty. It could for example include non-biological, informally adopted children, or relatives in the collateral line.

⁶ "Financial dependents" are defined in the Housing Code. The reference to 'existing' is due to the fact that depending on the time of marriage previous subsidy dependents may already be independent.

⁷ Housing records could be used to confirm dependents named in the subsidy application in case of dispute.

⁸ Current housing policy for new registrations is that married and cohabiting applicants who apply together must both be included as co-owners in the title deed. This precedent deals with a property that has already been registered as sole title.

⁹ Some of the rights in the agreement cannot on date of signature be clearly assigned to either the Beloved or the Geliefde. The "Subsidy Spouse," and the "Other Spouse" are separately defined.

¹⁰ Conveyancing note: Conveyancers would have to beware of making the assumption that all poor couples marry in community and including both names on the title deed.

4.4.3 The Dependents of the Other Spouse must also have the right to use the Property for housing, for as long as they are financially dependent.

4.4.4 Neither the Dependents nor the Other Spouse may rent the Property to someone else.

4.5 **Costs:** The cost of electricity, water and maintaining the Property must be shared by whoever lives in the house, as far as they are financially able.¹²

4.6 **When a Spouse or Dependents' right to housing will terminate**

4.6.1 A Spouse who is not the Subsidy Spouse loses the right to housing if the Spouses get divorced.¹³

4.6.2 Dependents who are not the Dependents of the Subsidy Spouse lose the right to housing if the Spouses get divorced.¹⁴

4.6.3 The Subsidy Spouse keeps the right to ownership and housing if the Spouses get divorced.

4.6.4 Financial Dependents of the Subsidy Spouse keep the right to housing if the Spouses get divorced.¹⁵

4.6.5 A Dependent's right to housing will end when they become financially independent, unless the Spouses both agree they can stay.¹⁶

4.6.6 The right of a Spouse or Dependents to housing will not end if the Subsidy Spouse alienates the Property.

4.7 **Conditions about substituting the Property if it is alienated**

("Alienate" is like selling or donating the Property)

The subsidy Spouse has the right to alienate the Property, on condition:

4.7.1 The selling price must be used to buy another property to be used for housing if they are financially able to do so.

4.7.2 The Spouse and Dependents rights in the new property must be the same as agreed in this Prenuptial Agreement for the first Property.

4.7.3 Any registration of the new property in the subsidy Spouse's name must be subject to the same housing rights.¹⁷

4.7.4 If the new property is sold the selling price must also be used to buy another property in the same way. The same must happen with other sales.¹⁸

4.8 **When the Property can be alienated free of the housing rights**

4.8.1 The Subsidy Spouse can alienate the Property NOT subject to these housing rights if the Other Spouse has passed away AND all the Dependents are financially independent.

4.8.2 The Dependents cannot claim a right of *usus* over the alienated Property again if after the alienation the Dependents become dependent on the Subsidy Spouse again.

4.9 **Confirmation of understanding of the consequences of this agreement**

4.9.1 The Subsidy Spouse keeps their right to be the owner after we marry.

¹¹ Note financial dependence is defined in the Meaning of Words appendix as someone who needs to live in a household that satisfies the means test to qualify for a housing subsidy.

¹² The *usus* right, unlike *habitatio* and usufruct, does not allocate this duty.

¹³ Conveyancing note: Divorce certificate confirms *usus* holder's consent not necessary on transfer.

¹⁴ Conveyancing note: Divorce certificate confirms *usus* holder's consent not necessary on transfer.

¹⁵ Conveyancing note: This means the *usus* rights are entrenched for as long as they are financially in need of housing. Acceptable forms of proof of financial dependency would need to be included in the agreement, to clarify the conveyancer's duties on transfer.

¹⁶ Conveyancing note: Acceptable forms of proof of termination of the right of *usus* (due to financial independence) would need to be included in the agreement to facilitate transfers free of the servitude.

¹⁷ Conveyancing note: The *usus* conditions would be carried forward into the new title deed.

¹⁸ Further clarification of this term would be necessary to avoid future disputes.

- 4.9.2 The Subsidy Spouse can sell the Property to someone else during our marriage, subject to the housing rights in this Prenuptial Agreement. (This means any new buyer can only live in the Property if another Property subject to the housing right has been substituted for the Property).
- 4.9.3 If no Property is substituted the buyer will have to wait until the Spouse has died and all Dependents are financially independent before the buyer can freely decide who uses the Property.¹⁹
- 4.10 What happens if the Subsidy Spouse is unable to secure the housing rights?
- 4.10.1 We understand there may be a legal reason making it impossible for the Subsidy Spouse to secure the agreed housing rights for a property.²⁰
- 4.10.2 The Spouses agree that if this happens, as soon as one or both of us acquires ownership or housing rights in another property, we will use the other property to secure housing for our financial Dependents, as agreed in this Prenuptial Agreement.²¹
- 4.10.3 If the 4.10.2 property is acquired solely by the Other Spouse, their Dependents will have the rights agreed in this Prenuptial Agreement for the Dependents of the Subsidy Spouse.²² The Subsidy Spouse's Dependents will then have the rights agreed in this Prenuptial Agreement for the Dependents of the Other Spouse.
- 4.10.4 When the 4.10.2 property is acquired jointly (by both Spouses) the Dependents of both Spouses will have equal rights, as agreed in this Prenuptial Agreement.
- 4.11 Accepting the housing benefits for the Dependents

The Spouses agree that it is their intention that the *usus* rights in this agreement vest in the other Spouse and Dependents immediately on their marriage. Insofar as acceptance is necessary by the dependents who will benefit from these rights, the Spouses accept these rights on their behalf.²³

5 EXTRA CLAUSES THAT CAN BE INCLUDED IF THE SPOUSES WISH:

- 5.1 Loss of housing right due to abusive behaviour
- 5.1.1 A Spouse or a Dependent's right to housing will end if their behaviour forces their Spouse or a Dependent to move out because of them.²⁴
- 5.1.2 The behaviour must be serious, like: Domestic violence, criminal behavior, drugs or alcohol abuse or as defined in the Domestic Violence Act.
- 5.2 Third party donations (gifts)
(The donor can make donations subject to terms and conditions.²⁵)
- 5.3 Options to purchase during the marriage²⁶
(Insert options in favour of the Other Spouse and Dependents in ranked order)

¹⁹ Conveyancing note: The *usus* right-holders could waive their rights if a sale becomes imperative. Clients must be advised that waivers, particularly in the instance of minors, could be problematic.

²⁰ This covers matters like impossibility of performance due to matters like *vis maior* and illegality.

²¹ Conveyancing note: Conveyancers would need to take care with this clause, as it could be a window for professional negligence. Close reading of the prenuptial contract would be necessary to alert the conveyancer of its applicability to the registration of ownership over a new property that is not a subsidized house.

²² *Mutatis mutandi*.

²³ Conveyancing note: Acceptance of minor's benefits confirms third party rights.

²⁴ The idea for this approach was taken from Mofokeng's discussion of Muslim marriage contracts that sometime include the provision of loss of housing rights. A court order would be necessary.

²⁵ This could be used where family wish to assist the couple and could be linked to lobolo agreements.

²⁶ Relevant to social issues s to w.

6.4.5.2 Precedent C: Succession Agreement for Heirs

Precedent C below is relevant to social issues x to z and aa to gg.⁵³⁰ Two succession templates have been drafted, one for an heir, precedent C, and one for a family trust, precedent D. The inclusion of a template for a *fideicommissum* with a fiduciary heir (or a registered long lease) was rejected, as too inflexible and formalistic. Both succession templates build on the *usus* template, meaning that ownership devolves subject to the *usus* servitude. Succession clauses in prenuptial contracts take precedence over wills.⁵³¹ In South Africa wills can be privately drawn and do not have to be lodged with the Master until death of the testator. They can generally easily be revoked or amended. When there are disputes over a will, or its legality, this makes proof more difficult and a court order may be necessary. Prenuptial contracts have the major benefit of being registered at the Deeds Office, giving the rights protected within them the massive benefit of publicity and certainty.

It has been shown that the process for the winding up of small intestate estates is often abused and used to exploit vulnerable family members.⁵³² In addition, with intestate estates of the poor there is often confusion as to rights and marital status.⁵³³ When estates are not reported, which is common, this freezes a property out of the formal system into informality. A prenuptial contract with a succession agreement stands even if the estate is not reported. The multiple substitutions of heirs in the model template is drafted to deal with this, both from the perspective of succession and the conveyance of transfer. Substituted heirs would still be able to take registration in future years, *with intervening registration of heirs not required*.⁵³⁴ This is achieved by phrasing the template in a manner that the heir's right to ownership does not vest until ownership is registered. The template thus allows for an incremental, cost-efficient re-integration of properties back into the formal system. The template also ensures that financial dependents outside of legal

⁵³⁰ See Table 2 62.

⁵³¹ See C Rautenbach "Succession by Contract (*Pactum successorium*)" in J Jamneck & C Rautenbach (eds) *The Law of Succession in South Africa* 2ed (2012) 231 235 where it notes that "... the pactum successorium vests rights irrevocably in the beneficiary after the death of the promisor".

⁵³² S Burman L Carmody & Y Hoffman-Wanderer "Protecting the Vulnerable from 'Property Grabbing': The Reality of Administering Small Estates" (2008) 125 *SALJ* 134.

⁵³³ 140 and 150.

⁵³⁴ Conveyancing note: The *usus* servitude together with multiple rather than single heirs would make sales and transfers of such properties difficult in practice.

dependents are free to benefit.

Precedent C begins with the option to exclude a succession agreement. This choice would result in heightened tenure insecurity, due to uncertainty whether the ultimate heir would register transfer and include the *usus* servitude. Accordingly an informal protective practice is included in this clause, using one of the strategies the poor use. The poor regularly hand over the physical title deed as proof of intention to give ownership when the legal costs of transfer are beyond them.⁵³⁵ The construction of this as a legal pledge (in this part of the template) therefore adds legal weight to one of the common processes of informal “regularization”. Note it is the physical document of the title deed itself that is pledged, not the property itself. The underlying value is therefore the cost of applying for a duplicate original title deed, currently approximately R600.00 plus postage and petties, a substantial sum for the poor.⁵³⁶ The main advantage, however, is that it draws attention to check the original is not held in pledge. A conveyancer may not apply for a duplicate original if the original is still available, and ownership may not be transferred without submission of the original title deed to the Deeds Office. This makes such pledges a potentially strong way to protect against a fraudulent transfer free of the *usus* right. An incorrect transfer that is a *fait accompli* is usually too expensive for the real poor right-holders to reverse.

The template has a number of variations suggesting choices of heirs. This makes clear that poor couples must be offered as many succession choices as the affluent. Notaries should be open to adjusting these clauses according to client needs. While the template works towards a fragmentation of the ownership right by entrenching overlapping rights (in keeping with current tenure thinking) it in no way results in the construction of second-class rights. The clauses precluding sale of the property to defray funeral costs has been inserted due to the researcher’s work experience, as this is a common issue. This was also the cause of conflict in the Constitutional Court

⁵³⁵ Roux LM *Land Registration Use: Sales in a State-Subsidised Housing Estate in South Africa* (2013) Phd thesis Calgary Alberta 99. The researcher is also aware of this practice.

⁵³⁶ Law Society of South Africa *Conveyancing Fee Guidelines* (2014) 11 <http://www.lssa.org.za/index.php?q=con,355,Conveyancing_fees_guidelines:_Effective_15_September_2014._Download> (accessed 24-07-2015).

case *Bhe v Magistrate Khayalitsha*.⁵³⁷ Emotional decisions (like those relating to burial or cremation) are sometimes included in will templates. This is to allow testators the opportunity to remove the burden of the decision from their heirs. This clause aims to encourage commitment to securing tenure both in the legal succession context and the informal family context. It is cast as an optional clause.

PRENUPTIAL. SUCCESSION AGREEMENT

(See next page)

⁵³⁷ *Bhe v Magistrate, Khayelitsha* 2005 1 BCLR 1 (CC).

Precedent C: PRENUPTIAL SUCCESSION AGREEMENT FOR AN HEIR

We wish to agree who will be the Heir or Heirs to inherit ownership of the Property on the death of the Subsidy Spouse.¹

WE, THE BELOVED AND THE GELIEFDE, THEREFORE AGREE:

1 HEIRS AND SUCCESSORS IN TITLE INHERIT SUBJECT TO *usus*²

Only ownership of the Property will be inherited. The inherited ownership will be subject to the *usus* servitude in Precedent B. This means:

- 1.1 The surviving Spouse has the right to live in the Property for their lifetime.
- 1.2 Our Dependents have the right to live in the Property for as long as they are financially dependent.
- 1.3 The Heir or Heirs must respect and protect the housing tenure of the living Spouse and our Dependents.
- 1.4 Any Successor in Title (other people who get the right to own) must also respect and protect this housing tenure.
- 1.5 The “Property” in this succession agreement means the property described in Precedent B and includes any property that is substituted to secure housing tenure, as agreed in Precedent B.

2 CHOICE NOT TO DECIDE THE SUCCESSION OF THE PROPERTY
(Choose either this clause 2 or alternately one of the options in clause 3)

- 2.1 The Subsidy Spouse is free to decide the Heirs by means of a will.
- 2.2 If the Subsidy Spouse does not decide the Heirs by will the Property will be inherited by intestate rules.
- 2.3 If clause 2.1 or 2.2 applies and the *usus* servitude is not yet registered on the death of the Subsidy Spouse, the original Title Deed must be given in pledge as security that the agreed *usus* servitude will be registered against the Property.³
 - 2.3.1 The Title Deed must be given in pledge to the surviving Spouse, or if they have died, to the oldest Precedent B Dependent or, if a minor, their guardian.
 - 2.3.2 The Title Deed must be held in pledge until the *usus* servitude is endorsed against the Title Deed at the Deeds Office.
 - 2.3.3 The holder of the pledged Title Deed has the right to refuse to release it for the purpose of transferring ownership to a third party, if such transfer will be free of the *usus* servitude.
 - 2.3.4 The pledged Title Deed must be released if a substituted property is being concurrently registered subject to the *usus* servitude.

3 CHOICE OF HEIRS (Note: Common examples. Customize according to client instructions)

3.1 The children of the Subsidy Spouse inherit in equal shares

The Property is bequeathed to the children of the Subsidy Spouse in equal shares

BUT

If any child of the Subsidy Spouse has already died, their share of the Property is bequeathed to their own living children in equal shares

BUT

If any child of the Subsidy Spouse has already died without children, their share of the Property is bequeathed in equal shares to the other children of the Subsidy Spouse (or if they have died leaving living children, to their children).

¹ For brevity’s sake the drafting does not include qualifications for where the spouses are co-owners, either for an original or substituted property. This would be necessary in a final template.

² Conveyancing note: The *usus* conditions would have to be inserted in the heir’s title deed.

³ Note the physical document is given as a pledge with its underlying value the cost of obtaining a duplicate original.

BUT

If there are no surviving descendants of the Subsidy Spouse the Other Spouse's children inherit in equal shares.

Alternately:

3.2 The oldest child inherits

The Property is bequeathed to the oldest living child of the Subsidy Spouse

BUT

If there is no living child of the Subsidy Spouse, the Property is bequeathed to the oldest living child of the oldest child of the Subsidy Spouse

BUT

If there is no such child, the Property is bequeathed to the oldest living child of the next oldest child of the Subsidy Spouse, in descending order

BUT

If there are no living children of the Subsidy Spouse, or living children of theirs, the Property is bequeathed to the oldest living child of the Other Spouse. The substitutions will then proceed as in 3.1 above.

Alternately:

3.3 A named single Heir inherits⁴ (add full name and ID's)

The Property is bequeathed to: X⁵

BUT

If the X Heir dies before the Subsidy Spouse, the Property is bequeathed to X's children in equal shares

OR

If the X Heir dies before the Subsidy Spouse, the Property is bequeathed to Y.

Alternately:

3.4 Named Co-heirs inherit (add names and ID's of Heirs who will be co-owners)

The Property is bequeathed to: X+X+X

BUT

If any of the X Heirs die before the Subsidy Spouse their share must go to their other co-Heirs in equal shares

OR

If any of the X Heirs die before the Subsidy Spouse their share must be go to their living children in equal shares.

4 CONDITIONAL VESTING OF INHERITANCE

4.1 The vesting of the inheritance of any Heir, testate or intestate, is conditional upon the Title Deed being registered in their name.⁶

4.2 If an Heir dies or is declared insolvent before the Title Deed is registered in his or her name, the next Heir must be substituted as the Heir.⁷

⁴ Conveyancing note: Multiple substitutions are to facilitate ease of transfer where interim transfers cannot be afforded.

⁵ Note this could be the other spouse, a dependent or an outside third party.

⁶ Conveyancing note: Conditional vesting is to avoid interim transfers that cannot be afforded.

⁷ Conveyancing note: Intervening transfer to deceased estate and loss to an insolvent estate are therefore avoided.

5 EFFECT OF SUBSTITUTION OF THE PROPERTY BY SPOUSES

(This clause will clarify the consequences if a property is substituted during both Spouses lifetime and the Other Spouse is a co-owner or sole owner. It will also deal with the succession consequences and the consequence of shifts in property value.)

6 ALIENATION CONDITION - HEIR TO SUBSTITUTE THE PROPERTY⁸

The Heir has the right to alienate the Property, on condition:

- 6.1 Another property of equal or greater value is substituted subject to the usus servitude for the surviving Spouse and Dependents.
- 6.2 The Spouse and Dependents rights in the new property must be the same as agreed in Precedent B for the first Property.
- 6.3 Any registration of the new property in the Heir's name must be subject to the same rights.
- 6.4 If the new property is alienated the same conditions must be applied to buy another property in the same way. The same applies with other alienations.

7 DIVORCE OF SPOUSES

On divorce of the Spouses any succession right in terms of this agreement:

- 7.1 Terminates for a Spouse that does not have any right to ownership in the Property.⁹
- 7.2 Terminates for Heirs not related by blood or adoption to a Spouse with ownership rights.¹⁰
- 7.3 Remains for the descendants and ascendants of a Spouse with ownership rights.¹¹

8 DEATH AND FINANCIAL INDEPENDENCE OF ALL PARTIES

- 8.1 The right to own the Property devolves upon the Heir (or co-Heirs) subject to the usus servitude in favour of the surviving Spouse and financial Dependents.
- 8.2 Once the surviving Spouse passes away and all the Dependents are financially independent, the usus servitude over the Property terminates and the Heirs (or their successors in title) can use or alienate the Property as they wish.

9 COSTS

Whoever is living in the Property must pay for the municipal rates, the electricity and the water.¹²

10 OPTIONAL EXTRA CLAUSES

- 10.1 The wife or husband of an Heir may not be given any share in the ownership of the Property.
- 10.2 Gifts when the subsidy Spouse or Heirs die
 - 10.2.1 The Property may not be sold or rented to pay for any funeral or tombstone.
 - 10.2.2 If our living family and friends wish to give a gift in memory of those who pass away, we ask them to try to help secure housing tenure for the living Spouse and our Dependents.

⁸ Conveyancing note: The servitude conditions would be carried forward into the new title deed.

⁹ Note a property might be substituted with a property that is co-owned by the spouses. The phrasing of this clause is to cover that eventuality.

¹⁰ Note a property might be substituted with a property that is co-owned by the spouses. The phrasing of this clause is to cover that eventuality.

¹¹ This clause is to assist dependents to prove their housing claims against the subsidy Spouse.

¹² This clause needs further thought and refining.

6.4.5.3 PRECEDENT D: SUCCESSION AGREEMENT FOR A TRUST

Precedent D below is drafted as an alternative succession agreement to precedent C. It creates a family land holding trust instead of heirs inheriting. It is relevant to social issues x to z and aa to gg.⁵³⁸ A family trust can be used where there is a normative belief that people belong to a property, rather than a property belonging to an individual who takes ownership, as discussed in chapters 3 and 5. While not the same, a trustee is conceptually close to the family decision-makers of customary law. It would therefore appeal to those couples with a strong African worldview that nevertheless wish to enter into a civil marriage. A trust would also be appropriate for multi-generational households who wish to retain the house as a “*familiehuis*.”

A discretionary trust is very well equipped to deal with future indeterminacy. It also allows for a wider and more flexible group of beneficiaries. In the pro-poor context all the disadvantages surrounding donations tax and transfer duty fall away. Notably it can provide for people to donate to the trust to enhance the property asset. This offers a vehicle for ongoing family intervention to upgrade housing. This is the optimum pro-poor tenure security option, as financial capacity within the extended family is a reality for many people awarded housing subsidies. Since the property is placed under the control of the trustee subject to the *usus* servitude, he or she would have to protect the tenure of needy family members first. The template also allows for the extension of the class of beneficiaries. This would enable affluent families to use it as a charitable vehicle for housing the wider kinship group.

On the death of an owner a property vests in their deceased estate and the executor must give effect to the terms of a succession agreement.⁵³⁹ *Mortis causa* trusts (trusts that come into existence on someone’s death) have the advantage that registration of ownership of land in the trust’s name is not compulsory for the legality of its terms, although registration is a duty imposed on the trustee.⁵⁴⁰ The legal right of trustees to act is however limited by the provision that they must first

⁵³⁸ See Table 2 62.

⁵³⁹ A “vested right” means the right has “accrued to the holder” according to the common law or statutory law, see Badenhorst PJ, JM Pienaar & HM Mostert *Silberberg and Schoeman’s The Law of Property* 5 ed (2006) 11.

⁵⁴⁰ S11(1)(b) Trust Property Control Act 57 of 1988.

obtain letters of appointment from the Master of the High Court.⁵⁴¹ This means that for people on the informal fringes, the terms of the trust might only be triggered in the formal system if an attempt is made to transfer the property. A document founding a *mortis causa* trust must be lodged with Master of the High Court (not the Deeds Office) when the estate is in the process of being wound up. There are only nominal costs involved in submitting a copy to the Master and appointing the trustees. The fact that the trust would already be incorporated in a prenuptial agreement lodged at the Deeds Office (as a public document) means that the tenure security capacity of this arrangement is considerably enhanced. The model provides for multiple substitutions of trustees, as a strategy to retain the efficacy of the prenuptial agreement even if the household fails to formally lodge the agreement with the Master, or to appoint trustees, over a period. In addition, the *usus* rights would endure, irrespective of the household's failure to take further formal steps.

There might be reservations about the Master of the High Court currently having the capacity to manage high volumes of land-owning trusts. For this reason a template *inter vivos* trust (a trust that comes into existence during the founder's lifetime) was not explored. Nevertheless the principles are the same, and an *inter vivos* trust could be used for those couples that wish to convert the property to family property immediately upon marriage. Agreements founding trusts for subsidized housing may be seen (by the State) as only advantageous for those estates destined never to be formally reported. If widespread, unreported estates could potentially affect hundreds of thousands of properties subsidized in South Africa.

In the event the pro-poor prenuptial agreement is seen as a viable approach, the drafting of notarial agreements for single people in multi-generational or skip-generational households (entrenching the same rights) would be a natural progression. The trust would also be a good fit, although only an *inter vivos* trust would be allowed, due to the bar on succession agreements outside of marriage.

⁵⁴¹ S 6.

Precedent D: PRENUPTIAL SUCCESSION AGREEMENT FOR A MORTIS CAUSA FAMILY TRUST (Alternative to Precedent C)

We wish to agree on the succession of the ownership of the Property on the death of the Subsidy Spouse. We want the Property to be kept as the family property.

WE, THE BELOVED AND GELIEFDE, THEREFORE AGREE:

1 TRUST PROPERTY SUBJECT TO *USUS*¹

Ownership of the Property will be subject to the *usus* servitude in Precedent B.

2 VESTING CLAUSE

2.1 On the death of the Subsidy Spouse ownership of the Property must devolve on our Trustees in trust for the benefit of our Beneficiaries as agreed below.

2.2 The "Property" in this succession agreement means the property described in Precedent B and includes any property that has been substituted to secure housing tenure according to the *usus* agreement in Precedent B.

3 NAME OF THE FAMILY TRUST²

The name of the Family Trust will be:

(The 'Family Trust')

4 THE TRUST BENEFICIARIES³

4.1 We agree that the Beneficiaries of our Family Trust will be:

4.1.1 The Spouse of the Subsidy Spouse signing this agreement (the 'Other Spouse')

4.1.2 The Subsidy Spouse's ascendants and descendants⁴

4.2 Termination of rights of Beneficiaries

4.2.1 If the Spouses divorce any benefit in this succession agreement for the *Other* Spouse, or his or her financial dependents that are not 4.1.2 dependents, terminates.

4.3 Extension of the class of Beneficiaries

4.3.1 Should all the Beneficiaries in 4.1 fail, the Trustees may extend the class of Beneficiaries as agreed in clause 8.2 below.

4.3.2 Should all the Beneficiaries in 4.1 acquire registered ownership of their own immovable Property, the Trustees may extend the class of Beneficiaries as agreed in clause 8.2 below.

4.3.3 The decision to terminate the Trust or extend the class of Beneficiaries according to 4.2.1 and 4.2.1 shall be at the sole discretion of the Trustees.

¹ Conveyancing note: The conditions would have to be inserted in the new title deed.

² This name could be the family surname, an ancestor's name or a descriptive name.

³ "Beneficiaries" are the people the trust must secure housing tenure for.

⁴ This includes biological and adopted children of the Other Spouse and the Subsidy Spouse.

5 NOMINATION OF TRUSTEES (5.1 or 5.2 must be chosen. 5.3 applies to both)

The Trustee who will make the decisions for the Family Trust will be:

5.1 A named Trustee⁵

A _____ (name and ID)

If A fails the Trustee will be B _____ (name and ID)

5.2 Named Co-trustees⁶

A _____ (name and ID)

AND

B _____ (name and ID)

If A or B fails the Trustee will be C _____ (name and ID)

5.3 A category of Trustees⁷

Category of persons A _____

If category A fails it must be substituted with category B _____

6 TERMINATION OF OFFICE OF TRUSTEE

6.1 Failing of all nominated Trustees

If all the nominated Trustees fail the Trustee must be nominated by the Other Spouse, or failing the Other Spouse, by the oldest major Beneficiary.

6.2 Statutory termination of office of Trustee

(This clause must explain the statutory requirements for termination of office and how this differs from Heirs, namely that you cannot terminate an Heir's appointment if they are behaving irresponsibly.)

7 GIFTS AND LOANS TO THE FAMILY TRUST

7.1 The living Spouse, the Dependents or another person may donate or loan money or Property to the Family Trust.⁸

7.2 Gifts on death (optional clause)

7.2.1 The Property may not be sold or rented to pay for any funeral or tombstone.

7.2.2 Trustees are requested to advise living family and friends that wish to give gifts (in memory of those who pass away) to put the cost of the gift towards helping secure housing Beneficiaries in need.

⁵ This could be the surviving spouse, a child once they are over 18, or another person.

⁶ This could include the surviving spouse, children over 18, or another person.

⁷ This could for example be the oldest surviving grandparent, parent, child, sibling, or sister or brother.

⁸ The clause that identifies the Trustees powers could provide these funds may only be used to improve or maintain the Property, or to buy an improved (or extra) property. This clause also allows for the family group to club together and put money into the Family Trust. This offers an alternative form of insurance against the loss of future housing tenure security. This clause also offers a vehicle for eg grandparents to donate into the Family Trust to secure the housing tenure of their family members after their death.

8 WHEN THE FAMILY TRUST TERMINATES

8.1 When both Spouses have died and the Dependents are all financially independent the Trustee may in his or her sole discretion decide:

8.1.1 The Family Trust terminates and the Property devolves on the Subsidy Spouse's intestate Heirs

OR

8.1.2 The Property is retained in the Family Trust to be used for the housing of any other relative of the Subsidy Spouse by blood or marriage that is financially dependent.

8.2 Should the Trustee elect to continue the Trust in accordance with 8.1.2, the Trustee shall:

8.2.1 Be free to exercise sole discretion to decide which relatives should be housed in the Property.

8.2.2 Be free to terminate the Family Trust in accordance with 8.1.1 at any time.

9 COSTS

9.1 Whoever is living in the Property must pay for the municipal rates, the electricity and the water.

10 CONDITIONS ABOUT SUBSTITUTING THE PROPERTY

The Trustees have the right to alienate the Property, on condition:

10.1 Another property of equal or greater value is substituted for the housing of the Beneficiaries.

10.2 Any registration of the new property in the Trust's name must be subject to the same rights.

10.3 If a new property is alienated the same 10.1 condition must apply.

6.4.5.4 PRECEDENT E: DISPUTE RESOLUTION STRATEGIES⁵⁴²

Precedent E below is relevant to social issues hh to qq.⁵⁴³ This precedent incorporates a number of contractual strategies for dispute resolution. Some of them are more experimental than others and are included to initiate debate. The following areas are likely to trigger common disputes in respect of the pro-poor prenuptial agreement: substituted properties for which the cost is not the same as the original property; money spent on improving the property; which family members have rights of occupancy; defining financial dependency and financial independence; letting and sub-letting. The clauses are predicated on the assumption that the poor are rarely able to afford the legal costs of litigation for civil immovable property claims.

⁵⁴² Clauses 1, 2, 3 and 4 are all optional clauses. They can be left out of the prenuptial agreement if the couple prefers to use the formal courts. Alternately a single clause, or a set of clauses, can be used.

⁵⁴³ See Table 2 62.

The first dispute resolution option relates to the interpretation of the contract and is drafted as a code of conduct. Since the existence of plural values is one of the social issues identified, it explicitly includes aspects of the relational pluralist theory of contract.⁵⁴⁴ The clause relates in particular to the expectation of reasonable negotiations in good faith, taking account of the need to avoid bargaining indeterminacy.⁵⁴⁵ While this would be of value to all couples, it enables in particular the right of couples to include communitarian values in keeping with cultural pluralism. In other words the agreed approach to interpreting the contract is used as a means to facilitate dispute resolution.

The second option is highly experimental and of the researcher's own devising. The notion of a private protector being given a 1% share in the property creates a veto mechanism.⁵⁴⁶ Those couples entering into a civil marriage that also enter into a lobola agreement (between the families) may wish to tie this clause to the lobola agreement, by appointing a family member of the bride as the protector. This could assist with the social issue where marriage is delayed because men are unable to pay lobolo, and also in those instances where women are willing to assist men to obtain it.⁵⁴⁷ Alternately the 1% could be increased, to link it to current values of cattle, in the same way that cash payments of lobolo are often linked to the value of cattle. The usefulness of such agreements might be enhanced if the prenuptial agreement is drawn as an affidavit attested by oath, with a copy given to the couple upon signature. This would support interim informal use if couples have a hybrid view that regards the civil marriage as a process that must take place over time.

The third option gives couples the choice to opt for free private mediation and arbitration by arbiters of their own choice should they wish when a dispute arises. It should be noted that while arbitration is not allowed for a matrimonial cause, it is allowed for matrimonial property.⁵⁴⁸ Arbitration processes are open to review under

⁵⁴⁴ It is outside the scope of this thesis to elaborate on recommended approaches to the theories of contractual validity and interpretation in South African law, in view of their complexity.

⁵⁴⁵ See Trakman (2010) *Buffalo Law Review* 1047-1050 and 1062-1068.

⁵⁴⁶ The 1% mirrors past nominal maintenance amounts.

⁵⁴⁷ The prenuptial contract essentially agrees to a waiver of the automatic half share offered by the default in community of property regime. The prenuptial agreement could therefore be linked to lobolo for a much more substantial share in the property, if the couple wished.

⁵⁴⁸ S 2 Arbitration Act 42 of 1965.

the Arbitration Act in certain circumstances.⁵⁴⁹ It should also be noted that s28 (1)(h) of the Bill of Rights also provides that children must be assigned a legal council at State expense in “civil proceeding affecting the child if substantial injustice would otherwise result”.⁵⁵⁰ The consequence of the arbitration clause is to give the parties choices that are capable of cheap legal enforcement if there is no further dispute, and to support informal enforcement where necessary. As noted by L Cotula “Despite widespread perceptions to the contrary, most disputes are settled out of court, even in the “West””.⁵⁵¹

The final option offers the couple the opportunity to give normative guidelines for use with the other precedents. The first set of guidelines relates to the ranking of dependent’s occupancy rights. The second set deals with sub-letting. The sub-letting of rooms and backyard informal structures (by subsidized housing owners) is widespread. It is often informally recognized by the State in much the same vein as occupants of informal settlements are often recognized as having the right not to be evicted from a particular shack. These sorts of informal rights are included in the land tenure continuum. This guideline accordingly straddles the informal formal divide in keeping with the broader aims of the thesis. The phrase in the model “if the Municipality allows” doffs a cap to the legal fraternity, while recognizing that most Municipalities recognize backyard tenants as inevitable.

If a prenuptial contract is registered, it becomes a public document lodged at the Deeds Office. This makes the model highly relevant to any property that has, or will, fall outside of the formal registration system due to informal conduct. It also offers the hope that changes in rights to ownership and use can still be incrementally formalized. In other words the State would be largely released from its current (highly onerous) obligation to try and grant access to the justice system to sort out problems triggered by reversions to informality. It would be up to the household to take responsibility, but with a firm legal foundation as their point of departure

⁵⁴⁹ S 33.

⁵⁵⁰ The Constitution; see also *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC).

⁵⁵¹ L Cotula “Legal Empowerment to Secure Land Rights” in *Legal Empowerment* 12.

Precedent E: PRENUPTIAL DISPUTE RESOLUTION CLAUSES

(Clauses 1, 2, 3 and 4 are all optional clauses. They can be left out of the agreement if the couple prefers to use the formal courts. Or a single clause, or a set of clauses, can be used.)

1 CODE OF CONDUCT FOR SPOUSES, DEPENDENTS AND SUCCESSORS IN TITLE¹

- 1.1 Negotiations about the terms of this agreement must be honest (in good faith) and fair.
- 1.2 People must negotiate with a spirit of reciprocity.
- 1.3 People must show respect for each other's dignity.
- 1.4 People must behave reasonably (not for reasons of anger, favouritism, jealousy, selfishness, revenge, greed or envy).

Optional extra clause:

- 1.5 People with the greatest housing needs must be considered first according to the principles of Ubuntu.²

2 APPOINTMENT OF PRIVATE PROTECTOR AS CO-OWNER³

We wish to name a private⁴ Protector⁵ to help protect housing tenure, as agreed by the Spouses in this Prenuptial Agreement.

- 2.1 On date of marriage the Subsidy Spouse will donate (give for free) a 1% share of the Property to the Protector.⁶
- 2.2 The 1% share shall be subject to the Precedent B *usus servitude*.
- 2.3 This 1% share means the Protector has the right to refuse to sign the power of attorney to transfer ownership to a new owner (a "veto" right).
- 2.4 The Protector may not be paid any extra amount for exercising their veto right in 2.3.
- 2.5 If the Protector and the transferor of the Property disagree, the dispute may be sent to a Mediator and/or Arbitrator to resolve.
- 2.6 The Protector accepts this benefit by signing this agreement.

3 FREE PRIVATE MEDIATION OR ARBITRATION OF DISPUTES

(A few suggestions are noted. This option requires considerable research)

- 3.1 Irresolvable disputes relating to the Property, or any substituted property, may be resolved by the appointment of a private Mediator and/or Arbitrator.⁷
- 3.2 Mediators and Arbitrators must arbitrate for free and must avoid unnecessary expense.
- 3.3 All mediation and arbitration must be informal.
- 3.4 No person involved in a dispute that is referred to mediation or arbitration may use a paid legal advisor or paid assistant.⁸

4 GUIDELINES FOR RANKING OF DEPENDENTS:⁹

¹ This introduces a more relational contractual approach.

² Ubuntu believes in *umuntu ngumuntu ngabantu* (a person is a person through other persons).

³ Conveyancing note: This is a barrier to ease of transfer.

⁴ The word "private" is to distinguish this from State Public Protector processes.

⁵ A particular person or class of person. If a particular person is chosen, substitutes must also be identified.

⁶ The Protector would be entitled to 1% of the selling price.

⁷ This clause would need to specify which mediation and arbitration approach should be taken.

⁸ If substantial injustice will result for a person under 18 affected by the outcome of the dispute they may be assisted by the free State legal aid under s 29(1)(h) of the Constitution.

⁹ These examples are drawn from the ch 3 social issues researched. They are merely suggestions and incomplete. Such guidelines could be made part of the *usus* agreement or the succession agreement, or could be used for the mediation and arbitration agreement.

- 4.1 The Dependents of the Subsidy Spouse who are still financially dependent must not be made to leave to make space for the Dependents of the Other Spouse.
- 4.2 Financially dependent Dependents must not be made to leave to make space for financially independent Dependents.
- 4.3 Financially independent Dependents may be allowed to stay in the house if they help the rest of the household.
- 4.4 Responsibilities financially independent Dependents could have for the household includes responsibilities like: Housework, caring for the sick, looking after young or old Dependents, or giving money for household expenses and maintenance.
- 4.5 If the living Spouse dies any person the other Spouse asks to look after our Dependents may be allowed stay with them in the Property.
- 4.6 The Property may only be alienated and substituted with another property if it is in the interest of all the people entitled to housing in the first Property.

5 GUIDELINES FOR SUBLETTING

Sub-letting one room or to a back-yard dweller:

- 5.1 The Property can only be sub-let if the Municipality allows it.
- 5.2 The Property, or any part of the Property, must not be sub-let if it will result in a financial Dependent or one of the Spouses being evicted.
- 5.3 The Property may only be sub-let if it is in the interest of the financial Dependents.
- 5.4 If the Property is sub-let, the lessee can accept responsibilities instead of paying money as rent.
- 5.5 Types of responsibilities could be: Housework, caring for the sick, looking after young or old Dependents, or giving money for household expenses and maintenance.

6.4.6 COMMENTS ON THE TEMPLATE PRECEDENTS AS A WHOLE

Certain types of informal conduct raise technical barriers that make it difficult for the formal law to secure tenure for the poor. Examples are the failure to fulfil the formal legal requirements for sales, donations, marriage, divorce, fostering, adopting, reporting estates, or arbitration of land disputes. Problems are also regularly encountered with missing or absent signatories and the resulting expense of obtaining High Court orders to facilitate transfer. Missing formal guardians of minors are a case in point. The model template uses a number of strategies to address this, from multiple substitutions of parties, to conditional vesting. The pro-poor drafting strategy is therefore entirely different to the conventional legal approach that takes formal compliance with successive legal steps as the foundational point of departure. Rather, it focuses on tactics to secure tenure from within the informal paradigm.

6.9 CONCLUSION

The template entrenches housing rights that limit the transfer of full ownership. A contrary view might champion transfers free of secure tenure for dependents, to strengthen housing markets. It is submitted that providing housing to vulnerable people was the State's aim in giving the subsidy. It is arguable that a view favouring unlimited ownership at the expense of dependents is – in this context – against the public morals.

While a good tool, a template is of course limited. No template contract would claim to be definitive unless it was a fixed standard contract, such as those used by banks and insurance houses. Other contract templates are only used as a guide for lawyers. Lawyers are still expected to refine them by applying their own legal expertise to the specific needs of their clients. While this chapter takes a pragmatic approach to using prenuptial contracts (to secure housing tenure) it does not claim the template clauses should be seen as definitive. In view of the sophistication and complexity of the fields covered that would be presumptuous. It merely aims to show the potential of prenuptial contracts to do the job in principle. “The job” includes confronting the problems caused by indeterminacy and the need for regularization, in a context where flexibility is imperative for future justice to be done.

The attempt to respect the informal practices of the poor (as indicative of their real world) – while seeking opportunities to create enhanced access to the formal law by private agreement – is experimental. What the experiment clearly succeeds in is the creation of an extremely strong housing right over land that is distinct from a maintenance claim. In other words it closes the door before the horse has bolted. In terms of cost, lawyers will recognize that it cuts out numerous legal interventions that are effectively outside the reach of the poor. Mere production of the prenuptial contract would not only serve as a bar to illegal transfer free of the housing right, but also as highly accessible *prima facie* proof of its contents in any court hearing. A prenuptial contract costs a fraction of the legal cost of securing the spread of rights canvassed in the template. In addition, any interested party is able to obtain a copy from the Deeds Office for a nominal fee.

The Bill of Rights provides that it is not only the responsibility of the State, but also of private persons, to act according to the Bill's provisions.⁵⁵² The right of all to access adequate housing, the right of children to family or parental care, and of children to shelter, is also enshrined.⁵⁵³ A fully realized prenuptial agreement of this nature could offer a dignified opportunity for the poor not only to respect and protect, but also to fulfill, these same constitutional aspirations. This is no doubt something many poor landowners would wish the law to assist them to realize.

⁵⁵² S 8(2) of the Constitution.

⁵⁵³ Ss 26(1) and s 28(1)(b)(c).

CHAPTER 7

APPLICATION OF THE PRENUPTIAL AGREEMENT

Note to the reader/viewer

This art image has been removed pending copyright approval.

To view the image on the internet please use:

The artist's name: "Walter Battiss"

and

The title of the painting: "Figures in White Light"

FIGURES IN WHITE LIGHT

Walter Battiss

1906-1982 Born Eastern Cape

7 APPLICATION OF THE PRENUPTIAL AGREEMENT

Compliance with the duty to support is frequently more apparent than real. There may well be dependents of the deceased who would lay claim to the heir's duty to support them; they would however be people who, in the vast majority, are so poor that they are not in a position to ensure their rights are protected and enforced.

*Bhe v Magistrate, Khayelitsha*⁵⁵⁴

7.1 INTRODUCTION

The template clauses drafted in chapter 6 serve as a theoretical pro-poor prenuptial agreement. While the template focuses on form, rather than detailed content, its potential to be applied (in principle) is capable of initial testing. Three areas are assessed to explore its capacity for application: Whether beneficiaries would wish to apply such prenuptial agreements; whether housing officials experienced in such issues would perceive them as applicable; and whether the template's legal constructs can be successfully applied.⁵⁵⁵ Beneficiary case studies, using the focus group method assess the beneficiary response. The interview method is used to assess the response of housing officials. Lastly the method of simulated client applications assesses the legal outcome. Battiss' painting, *Figures in White Light*, was chosen to open this chapter. It is a reminder of the pluralist contractual issues that result such as when a couples holding customary or hybrid norms marries with a so-called "white wedding" which carries Western Christian connotations.⁵⁵⁶

7.2 HOUSING BENEFICIARY FOCUS GROUPS

7.2.1 CHOICE OF CASE STUDY METHOD

The terms of a prenuptial contract can largely be determined privately, within the bounds of the law. The choice whether or not to contract is entirely voluntary. This

⁵⁵⁴ *Bhe v Magistrate, Khayelitsha* 2005 1 BCLR 1 (CC) para 96.

⁵⁵⁵ For a discussion of method triangulation see D Silverman *Doing Qualitative Research* 4 ed (2013) 288.

⁵⁵⁶ For a discussion of the cultural effect of Western style weddings in the past see N Erlank "The White Wedding: Affect and Economy in South Africa in the Early Twentieth Century" (2014) 57 *African Studies Review* 29.

makes the willingness of the poor to use them of primary relevance to applicability. The use of a case study allows qualitative research of a single phenomenon.⁵⁵⁷ The scope of this thesis does not allow for an intensive study. The focus group approach was therefore chosen, due to its capacity to test public attitudes regarding the use of prenuptial agreements for subsidized housing.⁵⁵⁸ A prenuptial contract is a very new concept for poor couples. The group approach offers a good way to introduce a foreign concept, paving the way for the design of larger studies in later research.⁵⁵⁹ The focus groups were exploratory by nature. As Gerring points out, “it is difficult to devise a program of falsification the first time a new theory is proposed. Path-breaking research is, by definition, exploratory. Subsequent research on that topic is confirmationist...”⁵⁶⁰ Considerable emphasis is placed below on the structuring of the focus groups, as much of the exploratory relevance arose out of the background sampling and contextual dynamics.

7.2.2 SAMPLING

The focus group needed to comprise people who fall within the unit of cohabiting housing beneficiaries. Sourcing such people poses difficulties for a private researcher. It was therefore decided to request a housing department to facilitate. There are disadvantages in using local government officials to assist with a focus group about private contracts – not least because there is sometimes conflict between housing beneficiaries and the State. Nevertheless, housing departments incorporate staff with considerable experience. Their knowledge covers housing administration, beneficiary conflict resolution, as well as broad social, economic and political issues. Should pro-poor prenuptial agreements prove themselves of value, legal aid will be necessary to bring them to fruition. Local government involvement was therefore also beneficial to raise interest in this larger debate.

⁵⁵⁷ See J Gerring “What is a Case Study and What is it Good For?” (2004) 98 *American Political Science Review* 341 342.

⁵⁵⁸ On the usefulness of focus groups to test public attitudes see WL Neuman *Basics of Social Research: Qualitative and Quantitative Approaches* 3 ed (2012) 318.

⁵⁵⁹ See J Smithson’s article on the use of focus groups for research on young adult’s family orientations, (with a multi-ethnic sample group) in “Using and Analyzing Focus Groups: Limitations and Possibilities” (2000) 3 *INT J Social Research Methodology* 103 106.

⁵⁶⁰ Gerring (2004) *American Political Science Review* 349.

A Western Cape municipality was asked to invite a particular spread of cohabiting couples. Participants were asked to identify themselves within these categories: Gender; born rural or town; primary schooling rural or town; cohabiting; married (white wedding with certificate)/(customary with or without certificate). Initially it was hoped the groups could include a mix of races. This proved difficult due to time constraints and translation issues. After one failed attempt, two further focus groups were held, one comprising Xhosa speaking black beneficiaries and another comprising Afrikaans speaking, so-called coloured, beneficiaries. A white beneficiary couple was considered as a participant by the housing staff, but not included in the end. During the consent signing process it was clear there were some low-literate participants.

7.2.3 THE FOCUS GROUP RESEARCH QUESTION

The term “focus group” refers to a group that is “focussed” on a collective activity.⁵⁶¹ The overall focus of the research questions was to assess whether beneficiaries would be willing, in principle, to formulate views on their household’s housing and ownership rights and entrench their preferences by prenuptial agreement.

7.2.4 MATERIAL FOR DISCUSSION IN THE FOCUS GROUP

Broad questions were prepared to initiate debate on whether couples would wish to agree in a marriage contract:

- adult beneficiaries’ and dependents’ rights to stay in the house
- who must make the decisions about the house, such as sale and succession
- how does sole title or co-ownership affect who should make decisions
- who could assist with alternative dispute resolution

Customary marriages and same-sex marriages were specifically excluded. Each discussion area was read through by the translator and translated, in summary form. It was then left open to the group to decide which aspects to discuss. It was made clear that their own relationship was not necessarily being discussed, but merely their

⁵⁶¹ J Kitzinger “The Methodology of Focus Groups: The Importance of Interaction between Research Participants” (1994) 16 *Sociology of Health & Illness* 103 103.

perception of what cohabiting couples may wish to agree.

7.2.5 FOCUS GROUP 1

The venue for focus group 1 was in an empty “RDP” house in a recently completed, largely black African, settlement. Participants brought their own seating, mainly upturned buckets, with a sprinkling of plastic chairs. The use of this venue greatly helped with maintaining the focus, as its small 45 square metre size contextualized the issues surrounding occupancy.

The housing officials were extremely helpful. Two female officials attended as observers. One was herself a Xhosa housing beneficiary living in the settlement. The translator chosen by the Municipality was the original community liaison officer for the settlement, called “Mr T” below. Community liaison officers are appointed by the beneficiaries to act as their representative to deal with the Municipality during the housing development process. They are beneficiaries of the development themselves and are usually chosen because the beneficiary community respects and trusts them. Mr T was included as a participant, as he was himself a cohabiting housing beneficiary living in the settlement. He came across as a good and respected communicator.

The meeting was planned for early evening as part of a housing consumer education programme. Due to early arrival and delays, the researcher spent two hours outside the venue waiting. This provided an opportunity to observe the contextual conditions of the participants. Interactions between adults in the street were friendly. A number of very young children played happily in a group. Some women were dressed in modern tight jeans and others wore the more traditional long skirts and headscarves. The tiny outside gardens were not individually fenced and no attempt had been made to do anything with this space. However, a number of colourful curtains with pretty ties were seen on the inside of windows. There were three vacant houses close-by that were not yet ready for occupancy. These houses had apparently been vandalized in the interim, with doors stolen and the like. The housing official said this was likely to be people from informal settlements outside

the community. The researcher was advised that participants would not want to leave for their homes nearby after eight pm.

The whole of the first evening was spent on the consent form process. The person who unlocked the venue commented early in the process that it was against their culture to use contracts. He added if they wanted to make an arrangement about a house they used an affidavit. The consent form delay was not foreseen, and resulted in one of the two-hour discussion sessions being lost, thereby considerably shortening the time available for discussion.

On the second evening it was unknown until the very last moment whether participants would indeed arrive. When they did, a largely new group of women arrived, by foot. Men arrived later, with a few more women. This reconstituted group was therefore not the original group invited by the Municipality, but a group invited by the translator. The profile of focus group 1 was as follows: Xhosa speaking 20; male 5, female 15; born rural 10, town 10; primary school rural 10, town 10; married with white wedding certificate 1⁵⁶²; women married customary with no certificate 5.⁵⁶³

The researcher did not ask if beneficiaries had received their title deeds yet, as this can be a sensitive question.⁵⁶⁴ The rural areas of birth and schooling were assumed to be in the Eastern Cape, based on the advice of the housing official. It was not clear how many of the participants represented both members of a couple. Whether all participants were cohabiting was not absolutely clear. The need for theoretical sensitivity to the housing context and cultural feeling was high. While the number of participants was greatly in excess of the optimum focus group number, they could obviously not be turned away. The researcher regarded the reconstitution of the group as beneficial, due to it being community driven.

⁵⁶² This phraseology was used to distinguish women with ordinary marriage certificates, customary marriage certificates and women married without certificates. See the different ways in which it is used in n551 above and in A Claassen's and D Smythe (eds) *Marriage Land and Custom: Essays on Law and Social Change in South Africa* (2013) 31 and 161.

⁵⁶³ In the researcher's experience customary wives in the Western Cape usually have a rural Eastern Cape background.

⁵⁶⁴ Cohabiting beneficiaries receive co-ownership in accordance with current housing policy.

The researcher is not a Xhosa speaker. Translation into English was of necessity much briefer than what the participants actually said. It was clear that participants had chosen to come more to listen than to speak. Time was short and it was not possible to create a situation of relaxed trust.

7.2.5.1 Record of the Focus Group 1 Discussion

At least three quarters of the time available was spent on the consent forms and translating processes. Accordingly input capable of being recorded was minimal. Only a few individuals gave input, with women speaking more than men. Much of the translation appeared to include the translator's opinion of what the collective opinion should be, but it seemed the group trusted his perspectives. While group discussion was invited there was very little, other than general murmurs of assent.⁵⁶⁵ There was no audio recording and the researcher's notes were therefore summaries of comments. This meant precise transcripts were not possible. Only participant's viewpoints that were very clear are recorded below, in order to avoid potential misrepresentation or misdirected analysis. They can at most be said to represent the views that the dominant voices chose to express.⁵⁶⁶

Mr T explained the areas for discussion and said while these subjects might be taboo, it is important that they be discussed. Four female beneficiaries and three male beneficiaries spoke. The rest remained silent. A female said if the woman is the sole title-holder the children must get the house ultimately and that children must always be considered first. Other women and men agreed. Another female said if both spouses' name is on the title deed the decisions about the house must be left open. A male agreed. A female said if one spouse dies the other spouse must get the house, and if they both die, the children. She felt a will should be used for this. There was a general murmur, but its meaning was unclear. A female said that if a woman told a man she wanted to agree she retains sole title, it would cause trouble in their relationship. She would be afraid of losing the man. Others agreed.

⁵⁶⁵ For a discussion of the problems surrounding how to record and analyze group interaction dynamics see W Duggleby "What About Focus Group Interaction Data?" (2005) 15 *Qualitative Health Research* 832.

⁵⁶⁶ The risk of reporting dominant voices was noted. See Smithson (2000) *INT J Social Research Methodology* 107.

A female said extended family would not interfere if the children needed the house. A male agreed family would put the children first. Another female said the couple must make the decisions themselves, not extended family. Another beneficiary agreed and said children must be first. A number agreed. A female said when children marry they must leave the house. A number of people agreed. When asked about alternative dispute resolution a woman said they would use the Magistrates Court or the State Attorney (her wording). Others agreed. When asked what they would do if they could not afford it, a woman said they would use elders from both families.⁵⁶⁷

Mr T raised the concern that he and the group did not know that such contracts were possible and exactly what could be put in them. Mr T said the group feeling was that this was a very new idea. He added they would want to participate in decisions about whether such contracts should be used. He said they would need to see the contract before they could give an informed opinion. He added he felt (personally) that it was important to engage with these new ways of thinking.

The researcher read back her notes for confirmation. She asked whether she had correctly recorded that speakers had felt spouses should not consult extended family about decisions about the house. This was confirmed. After the discussion the researcher indicated to the housing official that she had not expected this, in view of the presence of customary wives. The official said the women did not speak because they *knew* they had to consult their families. As we were packing to leave, Mr T said he did not know you could get a customary marriage certificate. The Xhosa housing official said she had also not known this.

7.2.5.2 Comments on Focus Group 1

The comment on the first night of the focus group drew attention to resistance to using contracts, as opposed to an affidavit, with contracts perceived as a Western construct. This is relevant, as legally in its simplest form a contract is an offer, the

⁵⁶⁷ Interestingly this woman was dressed in decidedly Western attire.

terms of which are agreed (by an acceptance).⁵⁶⁸ Housing beneficiaries often use affidavits as proof of an underlying lease or sale contract that has been offered and agreed to.⁵⁶⁹ Lobola agreements are also contracts. Nevertheless the comment showed that affidavits are not perceived as “contracts.” The researcher used the term “agreement” in the focus group thereafter.

The fact of Xhosa beneficiaries being unaware of customary marriage certificates indicated the high risk of customary couples marrying under the civil system, merely because they are unaware of their right to choose a customary matrimonial property regime. This made clear that the research question (whether couples would wish to apply the contracts) should be predicated by the question whether the couple has the knowledge necessary to give informed consent to the *type* of marriage.⁵⁷⁰ The woman’s comment that it would cause trouble if she said she wanted to retain sole title raises the issue of patriarchal households where a wife’s agreement may not be regarded as necessary, irrespective of the legal position.⁵⁷¹

Consent to the contractual terms by *both* parties is necessary to bring a contract into being.⁵⁷² This is relevant to the research question whether couples would wish to use a contract to order their marital affairs. The silence of the customary wives (about extended family consultation) could have resulted in a misrepresentation of the views of the participants in the data collection. This highlighted the fact that a similar risk may be triggered if attorneys do not understand the need for close questioning of their clients on issues of consent.

⁵⁶⁸ See SJW Van der Merwe, LF Van Huyssteen, MFB Reinecke & GF Lubbe *Contract General Principles* 4 ed (2012) 46.

⁵⁶⁹ B MacNab “Beyond Housing Provision: Strengthening Emerging Property Markets” July/Aug (2011) *SA Affordable Housing Magazine* 1. MacNab indicates that informal transfers are common, with a parallel system of informal deals at best confirmed by SANCO, a street committee or a police stamp. He claims the houses cost 120 000 to deliver and sell for R80 000 in the formal secondary market, but sell for R30 000 with an informal sale.

⁵⁷⁰ For a discussion of the legality of a consent obtained due to a mistake see Van der Merwe et al “Basis of a Contract” in *Contract* 22.

⁵⁷¹ The default position for monogamous customary marriages is in community of property. The wife thus becomes a co-owner of the property. However, the Recognition of Customary Marriages Act does not make s 15 of the Matrimonial Property Act applicable to customary marriages. It is unclear whether one spouse has the power to alienate property without the consent of the other spouse.

⁵⁷² For a discussion of consent obtained by improper means see Van der Merwe et al “Consensus Obtained by Improper Means” in *Contract* 86.

While the focus group showed an interest in the discussion, they clearly reserved their right to decide whether couples might wish to agree terms in a prenuptial agreement. An answer to the research question whether couples in the target group would wish to use such contracts was shown to be premature.

7.2.6 FOCUS GROUP 2

The venue for focus group 2 was at the Municipality, due to it being close to the settlement. Participants were invited to attend after picking up their title deeds. Of the nine participants, four of the unmarried cohabiting couples were co-owners and one female beneficiary was a sole title-holder. The profile of focus group 2 was as follows: coloured Afrikaans speaking 9; male 4, female 5; born rural 2, town 7; primary school rural 2, town 7; cohabiting 8; single 1 (female); couples 4. In both instances the rural area of birth was identified as a farm. A junior housing official attended and translated. The researcher is also a second-language Afrikaans speaker. This meant back translation was not necessary.

7.2.6.1 *Record of Focus Group 2 Discussion*

The single female beneficiary said she felt if her daughter married she would agree to allow her husband to live with them. A male said he would not allow that, as the male might hit (*slaan*) the other members of the household. Another male agreed other men should not be allowed. Other participants remained silent.

A female said if a woman died only the surviving partner and dependents should be allowed to stay in the house, never another family. Her partner agreed. Two others agreed that extended family should have no say. The remaining participants remained silent. Two females said if one of the couple forces the other to move out they should pay the rent for the other spouse to live elsewhere.⁵⁷³ Others agreed. The same female said a subsequent wife or children should not be allowed to live in the house. Two others agreed. The researcher asked whether the same should apply to a surviving woman marrying another man. A number of participants speaking at

⁵⁷³ This would be in accordance with the common law for a married couple, depending on which spouse has the “means”. It is part of the reciprocal duty of support between married spouses.

once said no new spouse should be allowed to live in the house. When the material was read back at the end the researcher asked for confirmation of this perspective. It was agreed that it was correctly recorded.

The use of private alternative dispute resolution was not initially understood. On explanation a female indicated she would be willing to agree to use the minister who officiated at her wedding, to help with dispute resolution. She said she would never use family. Her partner agreed. Another member of the group said the female who was speaking had trouble with her family. The group body language seemed to suggest people did not feel extended family should be involved, but no one else expressed this verbally. Someone said they could also use the assistance of a lawyer or community leader.

Interest was shown in the succession discussion. Surprise was expressed at the notion of agreeing this in a marriage contract. A man said both spouses should agree on decisions. Another man agreed. They felt a will is the best route. When asked if it might be necessary to retain the house as a *familiehuis* (family home) there were some murmurs, but no specific views.

One couple was the most vocal throughout and was unanimous in most of their views. It was clear they had a very strong relationship and would be really interested in knowing more. Nevertheless it was plain the group as a whole felt they did not have enough information to know whether such a contract would be a good thing.

7.2.6.2 Comments on Focus Group 2

There was a clear cultural difference between focus group 1 and focus group 2. The need for theoretical sensitivity to pluralist views was therefore evident. The comments on future spouses not being allowed to live in the house were noteworthy. This indicated some beneficiaries might wish to incorporate terms that exclude future spouses (who have a legal right to support and to share the matrimonial home).⁵⁷⁴ Such agreements would not be permissible, as against public policy. This spoke to a

⁵⁷⁴ The 45 square meter size of a subsidized house probably creates a different perspective on what should be agreed about extended family use.

possible category of couples that would not want to apply the agreements if it could not entrench this aim.

7.2.7 RESEARCH QUESTION RESULT

This thesis aims to run initial tests on the capacity of pro-poor prenuptial agreements to secure tenure in subsidized housing. Central to this is whether the target group would wish to use them. The two focus groups made clear that prenuptial contracts are currently a very foreign concept to the poor. On such brief exposure to the issues, beneficiaries were neither willing to confirm, nor to deny, the usefulness of such contracts. Reliability, in terms of a consistent outcome, could only be tested in two parallel focus groups, due to the third planned focus group falling away. The outcome was the same in both groups, namely they expressed uncertainty as to the desirability of such agreements. While an ambiguous outcome, it was sufficient to satisfy the exploratory aim of the focus group. Face validity was achieved in that the research appeared to measure what it was intended to measure.⁵⁷⁵

7.3 INTERVIEWS WITH GOVERNMENT OFFICIALS

7.3.1 CHOICE OF INTERVIEW METHOD

The use of prenuptial contracts for subsidized housing has a public component. Hundreds of thousands of South Africans are in need of State housing. Who gets such housing is highly contested. The protracted conflict over who should be given housing was illustrated by the Cape Town Gateway project. Over 1000 shack dwellers invaded incomplete subsidized housing to protest the allocation of more housing to informal settlement residents than to back yard dwellers.⁵⁷⁶ Subsidies are awarded to specific households from the housing waiting list. Lengthy State processes that include the recording of financial dependents are undertaken. Those given housing have waited years (often over a decade) to receive a subsidy.⁵⁷⁷

⁵⁷⁵ “Face validity” is based on a subjective assessment of validity.

⁵⁷⁶ C Lemanski “Augmented Informality: South Africa's Backyard Dwellings as a By-Product Of Formal Housing Policies” (2009) 33 *Habitat International* 472 472.

⁵⁷⁷ See ch 3.

By law, terms that are contrary to public policy may not be included in contracts. This makes it necessary to consider the public effect of household membership changes. Prenuptial contracts have the potential to seriously affect the balance of rights between third parties and recognized State beneficiaries. Structured interviews were therefore held with housing officials and municipal managers to gain information about opinions and attitudes regarding their use.⁵⁷⁸ The pro-poor prenuptial template was explained, followed by a questionnaire (in survey form) requesting them to rate such an approach according to good governance indicators.⁵⁷⁹ The aim could obviously only be to record their personal perception, and should not be seen as reflecting an official position.⁵⁸⁰

7.3.2 SAMPLING

Housing officials in the Western Cape were chosen, by purposive sampling. The municipalities chosen were the City of Cape Town (representing a metropolitan municipality) and Bergriver Municipality, Drakenstein Municipality and Mossel Bay Municipality (representing local municipalities) in the north-west, central and eastern part of the Western Cape Province respectively. Officials from the Western Cape Provincial Department of Human Settlements (dealing with relevant areas) were also interviewed. The sample of the three Western Cape municipal managers was chosen due to their legal training, in order to obtain an equity-orientated response to the prenuptial agreements. The opportunity to interview the municipal managers arose due to the researcher's earlier work in the Overstrand Housing Department, through contacts made at that time. In line with the pragmatic intentions of the thesis, it was also felt that the interviews would be fruitful to raise awareness of the issues under discussion. This could prove critical for future research or pilot projects.

⁵⁷⁸ DB Jarbandhan & deW Schutte "Using the Survey Procedure and Interview Data Collection Technique" (2006) 41 *Journal of Public Administration* 669 670.

⁵⁷⁹ On the steps for conducting a survey with an interview schedule see Neuman *Basics of Social Research* 173. The explanation of the pro-poor prenuptial agreement at the outset is not a typical approach.

⁵⁸⁰ The interview format was chosen as well suited to find out how a particular group of people think and to obtaining personal perceptions from their point of view.

7.3.3 GOVERNMENT OFFICIAL PROFILES

Fifteen officials were interviewed in all, including senior, junior, male, female, English, Afrikaans and Xhosa speaking officials, being twelve housing officials and three municipal managers. The interviews were one hour each.⁵⁸¹ The profile of the officials was as follows: Gender: Male 11, female 4. Level of seniority: Senior 8, middle 3, junior 4. Married: 9, unmarried 6. Three race groups were represented and a number volunteered that they had a prenuptial agreement and that they were familiar with family trusts. The three municipal managers all had formal legal training. Most of the housing officials were not equipped to give a legal perspective.

7.3.4 RESEARCH QUESTIONS RELATING TO APPLICATION OF THE PRENUPTIAL AGREEMENTS

The research question whether the State would be willing to see the agreements applied needed to be narrowed and specifically defined. Local government officials were therefore asked whether they felt the pro-poor prenuptial agreement complied with the requirement of good governance.

7.3.5 MATERIAL FOR DISCUSSION IN INTERVIEWS

An overview of the variety of approaches to governance is outside the scope of this thesis.⁵⁸² The United Nations defines good governance as promoting “equity, participation, pluralism, transparency, accountability and the rule of law, in a manner that is effective, efficient and enduring.”⁵⁸³ It identifies poverty as one of the three threats to governance, together with corruption and violence.⁵⁸⁴ These nine categories were used to create the interview questionnaire. The concepts were modified to bring them within the South African urban subsidized housing context. Three further questions were added: Whether the officials felt such contracts would

⁵⁸¹ One was shortened to 20 minutes.

⁵⁸² For a comparison of descriptors of good governance in the context of the cadastral system (which includes the legal side of the land register) see S Hull & JF Whittal “Good e-Governance and Cadastral Innovation: In Pursuit of a Definition of e-Cadastral Systems” (2013) 2 *South African Journal of Geomatics* 342 346.

⁵⁸³ United Nations “Governance” *Global Issues* n.d. <<http://www.un.org/en/globalissues/governance>> (accessed 30-04-2015).

⁵⁸⁴ United Nations *Global Issues*.

secure housing tenure; would assist beneficiaries to avoid disagreements; and whether beneficiaries would use them if legal aid were available.

Interviews were held face-to-face individually. They commenced with the governance questions being read to the official. The following legal points were then explained: Prenuptial agreements are voluntary, are registered at the Deeds Office making these public documents, and take precedence over wills. An abridged template of the prenuptial clauses was given to the official for reference purposes during the interview. The template was not read in full, but the import of its three sections explained, being:

- The basic *usus* servitude entrenching the housing right
- Succession (with various options for heirs or a family trust)
- Alternative dispute resolution options

It was explained that the questionnaire was premised on the assumption that legal aid would be available for prenuptial agreements relating to subsidized housing.

The officials were invited to interrupt the explanation of the agreement and ask questions. The officials were then asked to answer the questionnaire answering yes or no. The opportunity was then given for general qualifying comments, to allow for a more qualitative, unstructured, approach. It should be noted that junior officials in a housing department are usually mature people who are highly skilled in their understanding of the social issues in the communities they serve. The term “junior” is therefore misleading.

The question regarding equity as a governance measure was only asked of the three municipal managers who have formal legal training. They were shown, but not asked, the other questions. It was felt the officials without legal training would not grasp the range of the prenuptial agreement’s legal consequences.

7.3.6 HOUSING OFFICIAL RESEARCH QUESTIONS AND RESULTS

The governance questions and official’s answers are recorded below. The housing officials were required to answer the first eight categories and the three extra

questions. The legally trained municipal managers only answered one question, namely the equity question, pertaining to fairness.

Do you think that the pro-poor prenuptial agreement, would:

- *Be helpful as a record that could assist with the **efficient** running of a municipal housing department?* Yes=10, No=1, Uncertain=1
- *Be **effective** in dealing with beneficiaries' problems (would help find solutions to common problems)?* Yes=12
- *Be a **sustainable** way to help with beneficiaries' problems (could offer endurable solutions over time)?* Yes=12
- *Be a **transparent** way of dealing with beneficiary marital conflicts (open and clear)?* Yes=12
- *Assist with the housing department's constitutional **accountability** (answerability) to help beneficiaries?* Yes=11, Uncertain=1
- *Encourage beneficiaries to respect the **rule of law** (use formal legal solutions that can be enforced by the State, rather than using informal solutions)?⁵⁸⁵* Yes=11, No=1
- *Be **participatory** in its approach to beneficiaries, other dependents and family (allow all interested parties to be involved)?* Yes=11, No=1
- *Show respect for **pluralist** approaches to housing and ownership issues (respect different views of marriage and ownership)?* Yes=12

The governance questions were followed by the questions below:

- *Would it help **entrench tenure security** for beneficiaries and dependents in subsidized housing (keep their right to housing safe)?* Yes=12

⁵⁸⁵ "Rule of law" is used here in accordance with the World Bank's definition as "the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence" Kaufmann D, A Kraay & M Mastruzzi *Governance Matters VIII Aggregate and Individual Governance Indicators 1996–2008* (World Bank Policy Research Working Paper 4978) (2008) 6 <<http://ssrn.com/abstract=1424591>> (accessed 30-04-2015).

- *Do you think it would help stop arguments over houses if a husband and wife could agree about some of the things in the pro-poor prenuptial agreement before they get married?* Yes=11, Uncertain=1
- *Do you think beneficiaries would want to use such agreements if legal aid was available to them?* Yes=10, No=1, Uncertain=1

Thereafter housing officials were given the opportunity to give their views of advantages and disadvantages. Many officials commented the use of such agreements would be highly beneficial to both the beneficiaries and the State. One felt it should be recommended that they be funded as part of the housing subsidy allocation and another agreed.⁵⁸⁶ The challenges of low literacy and lack of education were recognized, but not regarded as insurmountable. A number suggested it could be part of the consumer education programme.

A number of officials from the local municipalities made reference to the huge amount of time spent by government officials on household disputes. Three officials felt use of the contract would helpfully remove the Municipality from perceived unfair involvement in escalating family conflict. One noted it would prevent the common problem of elderly beneficiaries being unduly influenced by family members. It was felt it would be helpful for beneficiaries to make succession decisions in their middle years before this could happen. An example was given of a family that had occupied a house since 1983, for which transfer of ownership could not be given, due to a family feud. Two officials spoke of the common disputes when family members move away and then return, either as they age, or due to financial need. It was advised much time is spent in writing reports (that pertain to family disputes) for the Public Protector.

Two Xhosa officials felt couples would find the clause about funeral expenses helpful, as this is a sensitive issue for many couples. One felt the clause could show further respect for customary views by adding the testator wished to be buried locally, with elders taking soil from the grave to attend to traditional rites elsewhere.

⁵⁸⁶ In this event for equality purposes equivalent contracts for domestic partnerships and marriages under other Acts would need to be offered.

Three officials said the clause relating to payment of the municipal bills would need modification. This was due both to internal municipal processes and to beneficiaries not accepting responsibility for bills. One official said a disadvantage could be that the succession clause would result in family members being unwilling to assist financially if they knew they would not inherit. Another raised the issue of disputes over money spent on upgrading the property, feeling the alternative dispute resolution process might lead to a deadlock.

One commented that records are destroyed after 15 years and this would have an impact. Two indicated that it was good that the dispute resolution would allow for input from Imams if required. Many further valuable views were expressed.

7.3.7 MUNICIPAL MANAGER RESEARCH QUESTION AND RESULTS

Three local municipality municipal managers were interviewed.⁵⁸⁷ The municipal managers were advised of the other governance questions, but not asked to answer them. They were shown the full prenuptial agreement templates (as attached in the schedules to this thesis) and only asked to comment whether they felt they were fair. They were not asked to comment on the soundness of the legal theory incorporated in the clauses. All three felt the templates were fair.

The municipal managers were given the opportunity to raise general issues surrounding equity. One commented that applicants form fictitious households to get on the waiting list, causing problems for them later, and that informal eviction was common and often unfair. One felt it would be good for the couple to acknowledge the value of the house in the affidavit, and they and another felt houses were trading for “next to nothing,” well below a fair market value. One commented the template is equitable for the children, it may (in some circumstances), be inequitable to stop the parents from selling the house to move the family back into a shack if this became a necessity. Two questioned whether the house should be viewed primarily as the family’s right to shelter use, or the title holder’s right to the exchange value. One felt the agreements would need the buy-in of street committees before they

⁵⁸⁷ One is recently retired but still consulting to municipalities.

would be broadly regarded as fair, and that perhaps a forum could emerge out of the current beneficiary committees to promote such agreements.

While all three managers were supportive of the fairness of the template, notably, the comment was made by one that: “The concept of legality does not exist in many of these settlements. Informal and traditional law is likely to dominate”.

7.4 SIMULATED CLIENTS

The legal validity of using a prenuptial contract for the poor and the validity of using a *template* prenuptial agreement are distinguishable. As discussed in chapter 6, the template approach of the applications might be regarded as a misdirected approach at the outset, with individual drafting for each client called for. In view of the need for legal aid for such contractual assistance, totally individualized drafting is a theoretical luxury the poor will never afford. This thesis aims to show the possible potential of pro-poor prenuptial agreements for use with subsidized housing. As such the more affordable template construct is tested in these simulations.

Case studies of real couples marrying and entering into a pro-poor prenuptial agreement would add depth to the research.⁵⁸⁸ However it would be entirely inappropriate to test the prenuptial template in this nascent stage on a real couple entering into marriage. Simulated clients are therefore used as a pragmatic strategy capable of exploration within the scope of this thesis. In order to maintain relevance, the client profiles are based on the highly topical facts of real people whose family disputes have shaped the current housing tenure debate. These narratives are then “turned” to create simulated clients for whom scenarios relevant to the research theme can be constructed.⁵⁸⁹ The sample life histories were chosen for their ability to reflect social issues discussed in chapter 3. Two of the simulated households relate to housing where men were given sole title. The third simulation is of two families sharing one informal shelter, whose names are still on the housing waiting list.

⁵⁸⁸ For a further discussion of narrative studies see JW Creswell *Qualitative Inquiry & Research Design* 2 ed (2007) 86, 213, 225.

⁵⁸⁹ See Creswell *Qualitative Inquiry* 224 for other approaches to “turning” stories.

Three sets of clients are simulated. An Eastern Cape case study in recent research by Kingwill is re-storied to create an example of clients with a hybrid view of matrimonial property rights.⁵⁹⁰ The African customary example uses the household facts recorded in *Bhe v Magistrate, Khayelitsha*.⁵⁹¹ The multiple-family example uses the household facts recorded in *Grootboom v Oostenberg Municipality*.⁵⁹² The real sets of facts are merely used to anchor the application to real contexts where there has been pressure for housing. Each set of recorded facts is used to create generic characters with marital issues relevant to other contemporary couples.⁵⁹³ This “re-storying” process creates fictitious characters that enter into a prenuptial agreement, thereby changing the course of events.

The template is capable of numerous different combinations. Not all the options can be explored for each simulated client. The simulation process will be deductive, using the participatory approach of a notary having been advised (in a consultation with the clients) of the background of each household. The notary then considers the needs of that household, before reverting to the notary’s personal template clauses (as modelled in the thesis) in order to decide whether and how to use the clauses.

The aim of these applications is merely to prove *in principle* the capacity of pro-poor prenuptial agreements to secure tenure in State subsidized housing. It is not to validate the template as the perfect prenuptial standard contract, which would be an inappropriate aim for an M Phil. Client simulations pose obvious risks as to reliability and validity. The person most at risk from participatory simulations such as those attempted is undoubtedly the researcher. Undertaking such speculative legal applications inevitably exposes her legal competence to criticism. Straightforward applications would not serve as the best test. Extremely complex sets of facts have therefore been chosen, precisely because difficult issues are more likely to disprove

⁵⁹⁰ R Kingwill “Lost in translation: Family Title in Fingo Village, Grahamstown, Eastern Cape” (2011) 217; H Mostert & T Bennett (eds) *Pluralism and Development: Studies in Access to Property in Africa*. The names in the Kingwill essay are already pseudonyms.

⁵⁹¹ 2005 1 BCLR 1 (CC).

⁵⁹² 2000 3 BCLR 277 (C).

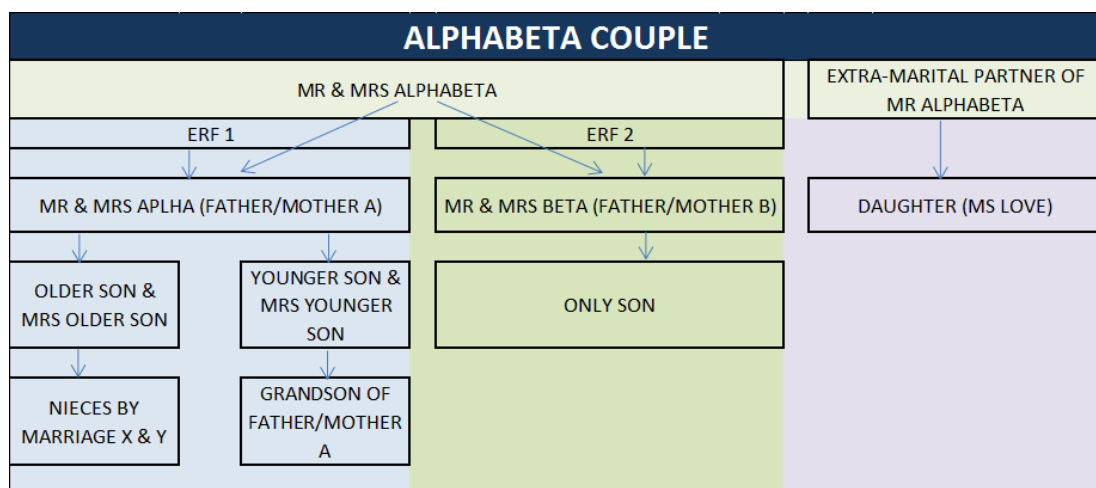
⁵⁹³ It should be noted that case studies are recorded in part from personal perspectives (often based on hearsay) They are not under oath and Court records give a very superficial record of a household’s situation. Obviously no real person has ever had the opportunity to use the prenuptial agreement template, or to consider its relevance to his or her own life. In this vein, if the real Bhe couple were to marry under current law, they would be best advised to marry under the Recognition of Customary Marriages Act, with the assistance of an expert in customary law.

the model's viability. The reader's tolerance is therefore requested for inevitable gaps in the face of the magnitude of the task.

The researcher's italicized identifiers describe characters by family relationship, to make the storyline clear. All names have been changed in both the original account and the simulations, to assist with fictionalization.

7.4.1 THE ALPHABETA COUPLE APPLICATION

TABLE 4: Alphabeta Family Tree



7.4.1.1 The Kingwill Case Study Facts

Kingwill's case study begins with four brothers who obtain private title to four different properties in the Eastern Cape, three generations previously.⁵⁹⁴ It is a peri-urban area, with land parcels much larger than the average "RDP" land parcel. Only two of the brothers (and their properties Erf 1 and Erf 2) will be discussed. The brothers both marry and have children. The summary below is the researcher's.⁵⁹⁵

Erf 1: Owned by *Father A*

The brother *A* marries. Brother *A* therefore becomes *Father A* and his wife *Mother A*. They have two sons, *Older Son*, and *Younger Son*. *Father A* dies and *Mother A*

⁵⁹⁴ The property was larger than the land given for an average subsidized house. The case study does not record whether any of the family members applied for subsidized housing. The State had however offered to build subsidized housing on such land parcels in the area.

⁵⁹⁵ For the original account see Kingwill (2011) *Pluralism and Development* 217.

inherits the property. The *Older Son* marries *Mrs Older Son*. They have no children, but raise a niece from *Mrs Older Son*'s side of the family. Her name is *Niece-by-marriage-X*.

Younger Son moves away to live in another city. *Younger* marries *Mrs Younger Son* and they have children. Erf 1 is registered in the name of *Younger Son*. It is not clear in the account what the cause of transfer was from the parents to him. *Older Son* and *Mrs Older Son* are living in Erf 1 and contest this ownership. The broader family feel that *Younger Son*'s family are the legitimate owners.

There is also tension surrounding an extra-marital partner of *Father A*, and a daughter born of this union, namely *Ms Love*. *Ms Love* pressures *Mrs Older Son* for rent as restitution believed to have been due from *Father A* (*Mrs Older Son*'s father-in-law). *Ms Love* has the means to provide her own housing. The family stand with *Mrs Older Son* in refusing *Ms Love* assistance.

Younger Son dies in 1990. *Mrs Younger Son* inherits Erf 1 intestate, and it is registered in her name. *Older Son* and *Mrs Older Son* remain living in Erf 1. *Older Son* dies in 1999. *Mrs Older Son* alleges that *Younger Son* stole Erf 1 while *Older Son* was incarcerated on Robben Island, by paying off a R10 mortgage bond on Erf 1. *Mrs Older Son* dies in 2010. The tale ends with *Mrs Younger Son* indicating she wants her son, *Grandson-of-Father/Mother A*, to move back to live in Erf 1.

Erf 2: Owned by *Father B*

The brother *B* marries. Brother *B* therefore becomes *Father B* and his wife *Mother B*. They have one son, *Only Son*. He does not marry, has no children, nor brothers or sisters. *Only Son* is a miner in Johannesburg and dies in 1984, after struggling with tuberculosis. The family believes that *Only Son* had a will appointing *Father B*'s two sisters as administrators, and that the will was torn up by *Older Son* (the cousin of *Only Son* living in Erf 1).

In 1989 Erf 2 is registered in the name of *Older Son* and *Mrs Older Son*, as a result of a commissioner's land title adjustment award. *Older Son* and *Mrs Older Son* never live in Erf 2. They rent it out to non-family. When *Older Son* dies, *Mrs Older*

Son continues to collect the rent for Erf 2. *Mrs Older Son* bequeaths Erf 2 to her sister's daughter, *Niece-by marriage-Y*, in a will. She also expresses the intention of leaving Erf 1 to her other niece *Niece-by-marriage-X*, as she feels she has a right to in view of it being stolen by *Younger Son*. *Mrs Older Son* dies in 2010.

The extended family have some grounds for believing *Mrs Older Son* stole Erf 2; that *Older Son* and *Mrs Older Son* were not formally married; and that *Niece-by marriage-Y* fraudulently pretended to be *Mrs Older Son*'s daughter to inherit her policies. The attorney who drew the will of *Mrs Older Son* says *Niece-by marriage Y* claimed to be *Mrs Older Son*'s adopted daughter.

There is "intractable disagreement regarding ownership" after decades of tension.⁵⁹⁶ The family regard *Older Son* and *Mrs Older Son* as having been custodians of Erf 2. They do not feel they were owners free to alienate it outside of the family. The property is still registered in the joint names of *Older Son* and *Mrs Older Son*. The tale ends with the family disputing *Niece-by marriage-Y*'s appointment as executor of *Mrs Older Son*'s estate with the High Court Master.

7.4.1.2 *The Kingwill Case Study Re-Storied as the Alphabet Family*

In the Kingwill case study civil wills are referred to at times, with the recognition that wills result in individual registered title. The disputes are nevertheless influenced by customary perceptions of the family belonging to the land, rather than the land belonging to individuals. While the family follows patrilineal norms, individualization of property is accepted at times. Perceptions of rights are not necessarily gendered, and either sex can act as custodian. Due to the complexity of these facts, this simulation will only explore one application.

The patriarch and matriarch of the brothers *A* and *B* are re-storied as *Mr and Mrs Alphabet*. The brother described as *Father A*, his wife, *Older Son*, *Younger Son* (and their dependents) are re-storied as the *Alpha family*. The brother described as *Father B*, his wife, *Only Son* (and their dependents) are re-storied as the *Beta family*. The original land is re-storied as one large peri-urban piece of land, which is owned

⁵⁹⁶218.

and then sub-divided by *Mr Alphabeta*. A sub-divided portion is then given to each branch of the family. In the story both the *Alpha family* and the *Beta family* is then awarded a subsidy, with which they build a house on their portion. The re-storied characters can be seen in the Table below. Note the *Alphabeta* family is entirely fictitious and has no connection to any real person.

7.4.1.3 *The Alphabeta Family Application*

The *Usus* Servitude

After discussion of various prenuptial agreement options *Mr and Mrs Alphabeta* instruct the notary to create the template *usus* servitude for *Mrs Alphabeta* over both the properties, together with an *usus* servitude for the *Alpha family* line over Erf 1, and an *usus* servitude for the *Beta family* line over Erf 2. In accordance with the template, financial dependents are also included in each family's *usus* servitude.

The consequence of this (on *Mr and Mrs Alphabeta's* marriage) is: *Mrs Alphabeta's* housing tenure is secured over Erf 1 and 2, together with the *Alpha family* line and the *Beta family* line respectively. The housing tenure of *Mrs Father A* and *Mrs Father B*, *Older Son's* wife and *Younger Son's* wife will be secured during their marriage if the property is the matrimonial home, by laws of general application. After divorce or the husband's death occupancy will not be as of right. No housing is secured for *Mr Alphabeta's* extra-marital partner, but *Ms Love's* housing tenure is also secured according to the definition of dependents in the template. This gives her request for rent weight only if she is still financially dependent. In other words, going forward, the tenure of the elderly grandmother and the financially dependent extra-marital dependent is protected, in addition to the other dependent children and grandchildren. *Niece-by marriage-X* and *Niece-by marriage-Y* (as collateral relatives by marriage) are excluded. The *usus* servitude will cease when all *Mr Alphabeta's* dependents living at his death are either financially independent or deceased.

Succession

In keeping with the hybridity evidenced, the notary advises *Mr and Mrs Alphabeta* to use the trusts mechanism for their succession clauses. On *Mr Alphabeta's* death the *Alpha Family Trust* will own Erf 1 for the benefit of *Father A* and his dependents.

The *Beta Family Trust* will own Erf 2 for the benefit of *Father B* and his dependents.⁵⁹⁷ *Mr* and *Mrs Alphabeta* nominate the oldest living member of *Father A* and *Father B*'s family to act as trustees for the *Alpha Family Trust* and the *Beta Family Trust* respectively. Failing them the oldest living member of the *Alphabeta* family is substituted to act as trustee.⁵⁹⁸

Succession of Erf 1:

On *Mr Alphabeta*'s death Erf 1 devolves on the *Alpha Family Trust*. At inception *Mrs Alphabeta*, *Father A*, *Older Son*, *Younger Son*, and his children all have a housing right in terms of the *usus* servitude. *Father A* is the first trustee, followed by *Older Son*, who will therefore hold the custodian decision-making powers regarding alienation and substitution of the property. On *Older Son*'s death *Younger Son* becomes the trustee. On *Younger Son*'s death his oldest child becomes the trustee. If all of *Younger Son*'s children are minors, the older of his two aunts will act as trustee, pending their majority.

The trustee would never be able to use rent solely for his or her own account (as was the case with *Mrs Older Son*) only for the interest of the beneficiaries. No rights are secured for *Mr Alphabeta*'s extra-marital partner. (*Mrs Older Son* would be in the same legal position as *Mr Alphabeta*'s extra-marital partner if she was not legally married, as she would have no *ex lege* marital right to housing in the matrimonial home.)

Older Son's wife and *Younger Son*'s wife will never have ownership or decision-making rights. Notably, despite her marital status and commitment to her nieces, *Mrs Older Son* will be powerless to use the property to benefit *Niece-by marriage-X* and *Niece-by marriage-Y*. The beneficiaries potentially entitled to future housing or ownership (should the trust terminate) includes: *Grandson-of-Father/Mother-A* and his siblings and other descendants in the *Alpha* family line. The patrilineal norm does not therefore exclude women as a class, but leaves *wives* (who may be contributing to the maintenance of the matrimonial home) housed, but voiceless.

⁵⁹⁷ The dependent clause would require adjustment for the naming of beneficiaries, in view of there being two properties. This is a simple adjustment of the kind ordinarily made when using templates.

⁵⁹⁸ The template dependent clause would include *Ms Love*. Alternately, if it is adjusted, *Mr Alphabeta* is free to insist *Ms Love* be included in the class of beneficiaries for one or both of the family trusts.

Succession of Erf 2:

On *Mr Alphabeta's* death Erf 2 devolves on the *Beta Family Trust*. At inception *Mrs Alphabeta*, *Father B* and *Only Son* have a housing right in terms of the *usus* servitude. *Father B* is the trustee. On *Father B's* death *Only Son* becomes the trustee. While wives have housing rights *ex lege*, the death of *Mrs Alphabeta* and *Mrs Father B* has no effect on this arrangement. When *Only Son* dies the older of his two paternal aunts becomes the trustee.

In terms of the template the trustee aunt has the option of terminating the trust due to the *Beta* family line having terminated. Alternately she can continue it for the benefit of extended family members. If the trust is terminated, the property devolves upon *Mr Alphabeta's* intestate heirs, in equal shares *per stirpes*, which would include the aunts. *Niece-by marriage-X and Y* would not inherit, with the patrilineal norm rewarding men and women in the *Alphabeta* line only. If the aunt decides to continue the trust for extended family, *Niece-by marriage-X or Y* could benefit as a housing occupant, but would not inherit and would never act as trustee. The need to prove adoption to secure these rights would fall away. Disputes surrounding missing wills are removed.

Using a Prenuptial Agreement as an Alternate Means to Resolve Disputes:

In the original case study, there is on-going conflict between *A* and *B's* families, and possibly the aunts. In the real-life account both Erf 1 and Erf 2 end up being owned by women who marry into the family. Neither are blood relatives of the original great-grandparent couple. As sole title-holders the law gives these wives absolute powers of disposal and use of the properties. In the real account one woman favours a male child only in her husband's patrilineal line. The other favours only nieces from her original family of birth. With Erf 1 there are allegations of the property being stolen by a younger brother. With Erf 2 there are allegations of destroyed wills, as well as contested marital status, fraudulent claims of relationship affinity and contested adoption. There are competing support claims of extra-marital children. Conflict could also arise between *Mrs Younger Son* as title-holder of Erf 1, her son (*Grandson-of-Father/Mother-A*) and *Mrs Younger Son's* other children. There would also no doubt be issues surrounding who paid to upgrade the properties; which dependents should occupy them and which dependents are still financially

dependent. The cost of litigation to resolve such disputes is very high, taking the hope of full formal legal resolution out of the equation. The private mediation and arbitration clause is relevant here. An application of this clause is made in 7.4.2 below.

In this *Alphabeta* simulation the prenuptial agreement itself could also potentially be used as a cost-effective means to negotiate resolution of these conflicts on the marriage of dependents. With Erf 1, on the marriage of *Grandson-of-Father/Mother-A*, *Mrs Younger Son* could make her bequest of Erf 1 to him conditional upon his marriage including a prenuptial agreement that establishes an *Alpha Family Trust*.⁵⁹⁹ This trust would then include the other siblings of *Grandson-of-Father/Mother-A*, as both dependents and beneficiaries. If he declines or does not marry, the same offer could be made to other siblings.

Similarly, with Erf 2, on her marriage, *Niece-by marriage-X* could also agree to use a prenuptial agreement to resolve the family conflict. In it she could establish a *Beta Family Trust* that comes into being on her death. She could agree that Erf 2 would devolve on the trust on condition the *Alphabeta* family waive their right to dispute her appointment as executor and title-holder. *Niece-by marriage-X* could then retain both her dependents and *Beta* family dependents as housing beneficiaries. Later substitutions of trustees and some form of money settlement could be agreed.

The situation could also be posited for *Mrs Older Son*, with her re-storied as “*Ms*” *Older Son* and entering into a prenuptial agreement. Assume that according to the story the *Alphabeta* family do attempt to evict *Mrs Older Son* from Erf 1 while *Older Son* is on Robben Island. They are not yet formally married and the *Alphabeta* family want to let another family member live there. (In the original account the fact that *Mrs Younger Son* inherited Erf 1 intestate is an indicator of poverty. She would only have inherited full ownership free of children’s rights if *Younger Son*’s deceased estate had been very small.) Assume further Erf 2 is about to be lost due to debt and “*Ms*” *Older Son* is willing to pay the amount owing if her rights are secured. (In the original account there are reflectors of this possibly having been the

⁵⁹⁹ This would have to be an *inter vivos* trust that comes into being once the right to the property is acquired.

case.) “*Ms*” *Older Son* can offer to pay subject to marriage to *Older Son*, with a prenuptial contract in which she includes her nieces as dependents.

In the original account *Older Son* and *Mrs Older Son* acquire ownership of Erf 2 under a land title adjustment award. Irrespective of whether the couple was married at the time, it would also have been open to the commissioner to establish a pro-poor family trust as a condition of his award, with all the stakeholders as beneficiaries, to resolve the title deed dispute.

7.4.2 THE UBUNTU FAMILY APPLICATION

7.4.2.1 *The Bhe Case Facts*

The summary and character identifiers below are the researchers.⁶⁰⁰ *VM (Father)*, a carpenter, has a 12-year relationship with *B (Mother)* a domestic worker. They are poor and live in an informal shelter in Cape Town. They have two minor daughters, *Daughter 1 and 2*. *Father* is given a subsidy and uses it to buy the land they live on and for building materials. *Daughter 1* stays with the couple but *Daughter 2* stays temporarily with their paternal grandfather, *Grandfather*, in the Eastern Cape. *Father* supports *Mother*, *Daughter 1 and 2*, and they are dependent on him. *Father* dies before building the house. *Father*’s estate comprises the land, the temporary shelter, building materials and a little movable property.

Grandfather is appointed by the Magistrate to represent *Father*’s estate. *Grandfather* and *Mother* agree that; “no marriage or customary union had taken place” between *Mother* and *Father*.⁶⁰¹ *Grandfather* insists *Father* paid lobolo, but *Mother* denies this. *Grandfather* advises he is going to sell the land to recover the expenses for *Father*’s funeral.

Fearing they will be homeless, *Mother* takes the matter to court on behalf of *Daughter 1 and 2*. The eventual result is that the Constitutional Court makes an order declaring the rule of male primogeniture (as applied in African customary

⁶⁰⁰ For the original record of the facts see *Bhe v Magistrate Khayelitsha* 2005 1 BCLR 1 (CC) para 12-17.

⁶⁰¹ Para 12.

inheritance) to be “inconsistent with the Constitution and invalid to the extent that it excludes or hinders women and extra-marital children from inheriting property”.⁶⁰² Previous intestate legislation permitting exclusion of women and extra-marital children from inheritance is declared invalid.⁶⁰³ The result is the female claimants – not *Father*’s patrilineal male line – inherit the land.

7.4.2.2 *The Bhe Facts Re-Storied as the Ubuntu Family*

The Ubuntu couple simulation creates a notary suggesting alternative legal options to clients *Father* and *Mother*, re-storied as *Mr and Mrs Ubuntu*. *Grandfather* is re-storied as *Grandfather Ubuntu* and *Daughter 1* is simulated as having a child *Grandchild*. As in the original account, *Mr Ubuntu* has sole title of the property. *Mr and Mrs Ubuntu* choose a civil marriage, as the couple’s urban orientation has resulted in a worldview that does not comply with the legal criteria for a customary marriage. While *Mr Ubuntu* does not agree with having a “family head,” he wishes to show respect for this worldview, as he loves his extended family and does not want to be seen as an outcast.⁶⁰⁴ The couple indicates the *Daughters 1* and *2* are equally reliable and must benefit equally. They say there is a high potential for future disputes with the extended family. *Mr Ubuntu* does not have any prior customary wife. These are entirely fictitious characters with no connection to any real person.

7.4.2.3 *The Ubuntu Family Application*

First the notary explains the basic outline of a pro-poor prenuptial agreement and *Mr and Mrs Ubuntu* identify their dependents (according to the template) as the *Daughters 1 and 2* and any future financial dependents of *Mr and Mrs Ubuntu*. *Mr Ubuntu* agrees to the *usus* servitude in favour of *Mrs Ubuntu* and their joint dependents. They agree *Mr Ubuntu* will retain ownership subject to the *usus* servitude. It is explained the prenuptial agreement is only for the subsidized property

⁶⁰² Para 136.4.

⁶⁰³ Para 136.5. The court also held that the Intestate Succession Act 81 of 1987 will apply in the context of people living in terms of customary law, thereby replacing the customary law of succession.

⁶⁰⁴ For a discussion of the family head’s duty in customary contractual obligations see C Himonga & T Nhlapo (eds) “Contractual Obligations in Customary Law” in *African Customary Law in South Africa* (2014) 186-196.

and the rest of *Mr Ubuntu*'s estate devolves intestate or by will. The notary broadly sketches three potential legal routes as a point of departure for succession to the property.

Scenario 1: The Daughters as Heirs

Mr and *Mrs Ubuntu* can agree the *Daughters 1 and 2* will be their joint heirs, subject to the *usus* servitude, with the conventional substitution of heirs following the intestate norms. On *Mr Ubuntu*'s death the *Daughters* inherit as co-owners.

The notary explains the legal consequences of this scenario: *Mrs Ubuntu* has housing tenure for her lifetime. The category of housing dependents includes the *Daughters* and any future children the couple may have, both *Mr Ubuntu*'s parents, as well as future grandchildren, if they are in financial need. Failing *Mr* and *Mrs Ubuntu* having other children, the *Daughters* will inherit jointly subject to the *usus* in favour of *Grandchild* and any other financial dependents of *Mr Ubuntu*. They may not dispose of the property until all financial dependents of *Mr Ubuntu* are financially dependent, or until an alternative property is substituted. If a *Daughter* dies her children inherit her share (in equal shares), failing children the other *Daughter* inherits, and failing her *Mr Ubuntu*'s parents.

In order to explain how the alternative dispute resolution would work, the notary uses the example of *Daughter 2* wanting her partner to move in, then disagreeing with *Daughter 1* about whether *Grandchild* is still in financial need and in need of housing. They could choose a religious leader or staff member of a non-profit organisation to mediate, to try to persuade the parties to agree. If they cannot agree an arbitrator may be appointed (such as the chairperson of a civic organization) to decide a solution. If the *Grandchild* might, for instance, be evicted, *Daughter 1* can approach the State for legal representation for *Grandchild* (due to children being entitled to legal aid if a substantial injustice is likely to occur).

Scenario 2: Retention of Male Primogeniture

The notary senses in the consultation that *Mr Ubuntu* is not willing to marry *Mrs Ubuntu* if there is no retention of male primogeniture over the property. *Mrs Ubuntu* is also concerned if it is not retained the *Daughters* might be rejected by his family

and lose that line of family support.⁶⁰⁵ The notary suggests scenario 2, whereby they could agree on *Mr Ubuntu's* death the property will devolve upon *Grandfather Ubuntu*, and failing him according to male customary succession rules. This inheritance would still be subject to the *usus* servitude to secure the household's housing tenure, with rights not limited by gender, only by financial independence.⁶⁰⁶ In other words *Grandfather* would be able to act as the normative customary custodian of the property in the interest of *Mr Ubuntu's* dependents, with his heirs inheriting subject to the same requirements. The notary briefly sketches the alternative family trust approach, but *Mr Ubuntu* indicates he feels strongly the future succession arrangements must be left in the hands of the male family heir.

The notary suggests the inclusion of the clause denying the right to use the property to defray funeral and tombstone costs. She then explains the legal consequences of the scenario chosen: On *Mr Ubuntu's* death *Grandfather Ubuntu* inherits (or failing him the next male in line). He inherits subject to the *usus* servitude in favour of *Mrs Ubuntu* for her lifetime, the *Daughters*, *Grandchild* and any other financial dependents of *Mr Ubuntu*. *Grandfather Ubuntu* or his successor cannot sell the house for funeral expenses. Once the dependents die or are all financially independent they would lose all right to the property.

As an example of how the alternative dispute resolution would work, the notary uses the example of *Mrs Ubuntu* inheriting all the movables, as the spouse's share that is not covered by the prenuptial agreement. She uses the building materials to build a house on the property. *Grandfather Ubuntu* disputes her right to live in it, saying the building materials belonged to *Mr Ubuntu* and therefore belong to *Grandfather Ubuntu*. They decide to arrange mediation, choosing a respected rural elder as mediator. He mediates a solution. Alternately he fails, and they decide the matter by referring it to arbitration by the street committee.

⁶⁰⁵ A testator is free to disinherit children. There is in principle no bar on re-instating a male primogeniture stipulation in a succession agreement. See C Rautenbach "Customary Law and the Reform of Customary Law of Succession Act" in J Jamneck & C Rautenbach (eds) *The Law of Succession in South Africa* 2 ed (2012) 243 248.

⁶⁰⁶ See *Bhe v Magistrate, Khayelitsha* 2005 1 BCLR 1 (CC) para 181 for the cherished African norm of respecting elders and the duty of the oldest child to protect siblings.

Scenario 3: A Private Protector

Mr Ubuntu indicates concern that he should not marry without paying lobolo, as an indicator of his commitment to care for his wife. He does not have the means to do so and does not wish to include his family in the negotiations, only a relative of *Mrs Ubuntu* – an aunt.⁶⁰⁷ The notary explains the possibility of using the property to show an intention to protect your wife. *Mr Ubuntu* could offer to give *Mrs Ubuntu's Aunt* the 1% protector's share in the property, as lobolo. This can be agreed either as the first installment, with an ancillary agreement, or as the whole amount. *Mrs Ubuntu* (or her family of birth) will have no further share in the actual ownership of the property.

The effect of this would be that on date of marriage *Mrs Ubuntu's Aunt* becomes the 1% co-owner, subject to the *usus* servitude, with *Mr Ubuntu* retaining ownership of the remaining 99%, subject to the *usus* servitude. This gives *Mrs Ubuntu's Aunt* a veto right if *Mr Ubuntu* wishes to alienate the property, as she can refuse to sign the transfer papers. In other words she can hold *Mr Ubuntu* to his intentions to act in *Mrs Ubuntu* and their dependents' interest. She is also effectively able to protect the interest of *Mrs Ubuntu's* dependents (that may in the future include members of her natal family). On *Mr Ubuntu's* death, the remaining 99% can then devolve as agreed in scenario 1 or 2, or (for example) to the oldest member of *Mr Ubuntu's* family, irrespective of sex. The notary then enquires whether the couple feels this would cement family relations sufficiently for the marriage to be accepted by the broader family.

The notary explains the legal consequences of this latter scenario: On *Mr Ubuntu's* death *Grandfather Ubuntu* inherits the other 99% of the property, subject to the *usus* servitude. *Mrs Ubuntu* has a housing right for her lifetime and the other dependents for as long as they are in need, or as otherwise agreed with *Grandfather Ubuntu* or his successors in title. *Mrs Ubuntu's Aunt* has no housing right and her 1% must go to a substituted protector in the event of her death. In view of *Grandfather Ubuntu* having housed one daughter in the past, did the couple feel such arrangements could be amicably agreed? If it is felt more lobolo is required, *Mr Ubuntu* could suggest a

⁶⁰⁷ See para 209 for the contemporary acceptance of women as the head of the family.

larger percentage share for relatives of *Mrs Ubuntu* to co-inherit with *Grandfather Ubuntu* on *Mr Ubuntu*'s death. This would also be subject to the *usus* right.

In terms of alternative dispute resolution the notary uses the following example: *Mrs Ubuntu*'s *Aunt* moves in and lives rent free, but looks after *Daughters* and *Grandchild*, and helps with household expenses. *Grandfather Ubuntu* wishes to sell the property and offers *Mrs Ubuntu* and her *Daughters* housing in a substituted property in his rural area. This is far from *Mrs Ubuntu*'s work and she will have no source of income. *Mrs Ubuntu*'s *Aunt* takes up her role as protector and refuses to sign the legal documents for a sale and substitution. The matter goes to mediation and they choose as mediator the leader of a customary forum (that has constituted itself informally in the urban area where the property is located).⁶⁰⁸ He mediates a solution (for example) whereby *Mrs Ubuntu* and her aunt buy the property from *Grandfather Ubuntu*, as equal co-owners, subject to the *usus*. *Mrs Ubuntu*'s *Aunt* pays the purchase price, which is half the normal value, due to the value of the property being less while subject to the *usus* servitude.

7.4.3 THE FAMILIEVAS COUPLES

7.4.3.1 *Grootboom Case Facts*

The summary and character identifiers below are the researchers.⁶⁰⁹ In *Grootboom v Oostenberg Municipality* approximately 390 adults and 510 children applied to the Constitutional Court to protect their rights to access adequate housing. The first applicant lived in a shack with her common law (sic) husband and their child. The shack belonged to her sister and her husband, and their three children. The two families lived together in the one shack. Other applicants included many instances of three to four families in one shack.⁶¹⁰ The first applicant had placed her name on the housing waiting list many years before the court case. The first applicant died "homeless and penniless".⁶¹¹

⁶⁰⁸ The researcher has worked in Western Cape contexts where there are such bodies.

⁶⁰⁹ For the original account see the court *a quo* report in *Grootboom v Oostenberg Municipality* 2000 3 BCLR 277 (C) 280-281.

⁶¹⁰ 281.

⁶¹¹ These last two facts are not derived from the judgement itself, but from P De Vos "Irene Grootboom Died Homeless Forgotten, No C-class Mercedes in Sight" (11-08-2008) *Constitutionally*

7.4.3.2 *The Grootboom Facts Re-Storied as the Familievas Families*

For the *Familievas* couple simulation only one construct will be very briefly explored, for a mutually agreed multi-family home. The first applicant and her common law husband will be re-storied as *Mrs* and *Mr Familievas*. The first applicant's sister and her husband will be re-storied as *Mrs Sister-Familievas* and *Mr Sister-Familievas*. Note these are fictitious characters.

7.4.3.3 *The Familievas Families Application*

Recognizing the dire uncertainty of their future, both couples in the story wish to commit to a multi-family *familiehuis* according to the matrilineal line, as insurance against loss of future housing tenure. At the time of marriage both couples have their name on the housing waiting list. They discuss various options with a notary doing a *pro bono* clinic. Both couples decide to enter into a prenuptial agreement with the same terms, in the hope of one day securing a joint family home.

The dependent category is extended (by both couples) so that each couple includes the dependents of the other couple. This is conditional upon mutual terms being agreed in a prenuptial agreement by the other couple. The *usus* servitude is therefore for a broader group extending to the collateral line. Dependency is still based on financial dependence and the need for housing. In both agreements they choose as heir the oldest matrilineal member of the *Familievas* family (possibly with substitutions of spouses, should the matrilineal heirs all fail). They choose the mediation and arbitration clause.

Dispute Scenario 1: Only One Property is Acquired for Both Families

Mr and *Mrs Sister-Familievas* are awarded subsidized housing and the families live together as agreed.⁶¹² *Mrs Familievas* passes away before she gets housing. *Mr Familievas* gets a very good job, and a dispute arises whether *Mr Familievas* and his child should remain in the house. They ask a community leader to mediate. The

Speaking <<http://constitutionallyspeaking.co.za/irene-grootboom-died-homeless-forgotten-no-c-class-mercedes-in-sight/>> (accessed 25-04-2015).

⁶¹² Note this may be contrary to municipal regulations relating to overcrowding. The agreement could however be used as proof of lateral dependency in the subsidy process.

mediator facilitates an agreement that *Mr Familievas* and his daughter will move out. For example the terms could be that rent from a back yard dweller will be given to the child of *Mr Familievas*, to rent a room for her in a friend's house closer to her school.

Dispute Scenario 2: Two Properties are Acquired

Both families are awarded subsidized housing and live in their own houses with their own dependents. In later years the property of one family is expropriated to make way for a new road. While the parents are paid out, they are jobless and seek work in another city. Their children are in dire need of housing to complete their schooling in the original area. The other family's property is bound in terms of the prenuptial agreement to assist with housing these financially dependent dependents. A dispute arises as to whether the children are financially dependent on the remaining family. The parents who have moved away are told to contribute towards the maintenance of the property, to secure their children's housing. They choose the local headmistress to mediate.

7.4.4 COMMENTS ON THE CLIENT SIMULATIONS

The simulations all had some shortcomings due to the brevity of the legal applications. It was apparent that additional practical outcomes were possible. It was also clear that a final standard template would require added theoretical legal input, particularly for the mediation and arbitration section. It is nevertheless submitted that the exploratory applications definitely succeeded in showing a template's potential to apply existing law functionally, in the given context. They also showed a template clause's ability to embrace plural views and to lead to flexible pro-poor outcomes, as well as a client-centred capacity to mirror the contracting couple's desires.⁶¹³ The legal solutions showed themselves to be very complex. This makes the challenges to couples understanding their contractual options great. Community and religious educational forums could take this on. In addition, affluent clients seldom fully understand the options they choose, with simple explanations that are reductive being necessary for every client.

⁶¹³ Gender equality outcomes are left to the reader to consider.

Despite this legal complexity, systemic simplicity was also evidenced in the applications. In the event the families undertook no further formal legal processes (other than the registration of the prenuptial agreement) the rights entrenched to secure tenure could remain largely certain over time. All three simulations reflected problems the average poor person could never afford to resolve legally. The input required for the numerous intervening transfers and court actions (by normal legal channels) would have been huge when compared to the input for the prenuptial agreement. In addition, the formal legal route would have offered much narrower protection for the vulnerable. Once registered, the effect of the agreement on future transfers of ownership was shown to be extremely simple, except in certain instances with transfers free of the servitude. There was also the benefit of cutting out intervening transfers (and unreported deceased estates) that converted unregistrable transactions, into registrable ones. The registration of the servitude itself was also shown to be simple, provided a standard template can be used.

7.5 CONCLUSION

The focus groups proved an important method to test the applicability of pro-poor prenuptial agreements on the basis of willingness to use them. They gave a brief – but highly necessary – indicator of a social, rather than legal, response. As Gerring comments: “The triangulation essential to social scientific advance demands the employment of a variety of (viable) methods, including the case study”.⁶¹⁴ The responses pointed to the definite need for further case studies before the utility of prenuptial agreements for the poor can be fully tested. The focus groups served as a healthy reminder that private contracts must never be made available as a means to “manage” the poor, but must be based on the poor’s desire to use them.

The interviews with housing officials were positive about government being willing to see such agreements used, based on governance criteria. While these were personal, not official responses, they serve as an indicator that government may be willing to engage on issues of legal education and legal aid to facilitate such

⁶¹⁴ J Gerring “What is a Case Study and What is it Good For?” (2004) *American Political Science Review* 341 353.

agreements. The client simulations showed that template clauses could, in principle, be applied to legally address the given context within current law.

The methods triangulated in this chapter showed the potential value of applying private marital contracts, both for housing beneficiaries and the State. This brings to mind the Bill of Rights principle that its provisions bind both private individuals and the State.⁶¹⁵ As expressed by the Constitutional Court in *Government of the Republic of South Africa v Grootboom*: “A right of access to adequate housing also suggests that it is not only the State who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing”.⁶¹⁶

⁶¹⁵ The Constitution S 8(1) and 8(2).

⁶¹⁶ *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) para 35.

CHAPTER 8
CONCLUSION: PRENUPTIAL AGREEMENTS TO
SECURE HOUSING TENURE IN SUBSIDIZED HOUSING

Note to the reader/viewer

This art image has been removed pending copyright approval.

To view the image on the internet please use:

The artist's name: "Xolile Mtakatya"

and

The title of the painting: "Making Ends Meet"

MAKING ENDS MEET

Xolile Mtakatya

1968- Cape Town

8 THE PRO-POOR PRENUPTIAL CONTRACT AS A LAND TENURE SECURITY TOOL

Families must be strengthened by interventions that will enable kinship networks to maintain and improve support to vulnerable family members

*Family Ties, Blood is Thicker than Water*⁶¹⁷

8.1 OVERVIEW OF THESIS

In chapter 2 Kandinsky's painting *Complex Simple* was used to visually illustrate the methodological aim of collating complex social and legal components to compose a simple prenuptial agreement design. This was followed by the quotation "*Exitus acta probat – the end justifies the means,*" reflecting the pragmatic approach the thesis would use. This concluding chapter begins with Mtakatya's painting of the complex-simple relationship between subsidized housing, socialization and the survival strategies of informal traders. The title, *Making Ends Meet*, is fitting for a closing chapter that must evaluate whether the end has indeed justified the means, and whether pro-poor prenuptial agreements can, in principle, meet the need to secure subsidized housing tenure.

The research questions identified in paragraph 1.5 of chapter 1 of the thesis have been answered, using the methodology outlined in chapter 2. The thesis aimed to identify appropriate terms for a pro-poor prenuptial agreement to secure housing tenure, given the social context of subsidized housing. After an assessment in chapter 3 of the limited dataset of social issues, and of the legal and tenure framework in chapters 4 and 5, an appropriate process and terms were developed. The identification of terms was largely not illustrated by theoretical enumeration, but by the action approach of drafting a template. This was from the perspective of a participatory notary acting for clients presenting with the needs that surfaced from the dataset of social issues.

⁶¹⁷ S Gordon, B Roberts & J Struwig "South African Social Attitudes Survey - Family Ties: Blood is Thicker than Water" (2013) 11 *HSRC Review* 17 19.

The aim of designing a prenuptial agreement template for couples with rights to subsidized housing (marrying under the Marriage Act) was realized in chapter 6. The model is designed in a manner consistent with contemporary land information system approaches. It focuses on the importance of including relational information and is capable of flexible outcomes. Chapter 7 subjects the model to initial testing and succeeds in proving *in principle* the potential of such agreements to secure housing tenure rights (for vulnerable cohabiting men, women and their dependents) in subsidized housing. Brief discussion of the terms chosen is interspersed between the drafting and the application in chapter 7, although the drafting itself serves as the primary vehicle illustrating the construct. An analysis is threaded throughout the research considering whether the argument is defensible that prenuptial agreements should be brought within the land tenure security debate. A few key themes arising out of the study will now be discussed in conclusion.

8.2 PRENUPTIAL AGREEMENTS AS A DIVERSIFIED LAND RIGHT

It has for some time been recognized in South Africa that there is a need for diversification or fragmentation of land rights to ensure protection of broader rights and interests.⁶¹⁸ The need to protect overlapping use rights is recognized in various statutes promulgated after the advent of the democratic era in 1994, but these statutes are conventionally invoked with disputes against the State or outsiders, not against household members or relatives.⁶¹⁹ Badenhorst et al point out that the property clause in the Constitution should not be interpreted as a guarantee “to insulate the status quo and existing position of the individual property holder against any interference,” but rather as a guarantee “to establish and maintain a balance between the individual’s existing position and the public interest”.⁶²⁰ The first group affected by an “individual’s existing position” are those people who share housing with the individual.

When housing has been acquired by means of a free subsidy (under a State housing

⁶¹⁸ PJ Badenhorst, JM Pienaar, H Mostert & M van Rooyen *Silberberg and Schoeman’s The Law of Property* 4 ed (2004) 5.

⁶¹⁹ The Extension of Security of Tenure Act 62 of 1997 and the Interim Protection of Informal Land Rights Act 31 of 1996 are examples of such Acts.

⁶²⁰ Badenhorst et al *Silberberg’s Law of Property* 4ed (2003)11.

programme) any constitutional enquiry reflecting on the public interest must go beyond the principles of family law. Dependents are by definition more vulnerable than those upon whom they depend, due to age, youth, misfortune or illness. A needy dependents' interest in the use of specific land controlled by another household member is therefore the interest *par excellence* that must be protected against arbitrary deprivation. The prenuptial agreement designed accordingly proceeds primarily from the need to protect the housing interests of all members of a household. It does not take the conventional approach of protecting spousal interests alone. Neither does the model take the conventional route of creating a group right that can function as a single entity. Instead it synthesizes various legal mechanisms to create a new form of tenure that reflects a diversification of existing constructs. This diversified approach not only protects all members of the household, but also takes into account public policy considerations regarding the need for housing beneficiaries to – as Dyaloyi's painting in the first chapter illustrates – enjoy their properties responsibly.

8.3 RELATIONAL RIGHTS: A CORNERSTONE FOR HOUSING RIGHTS

Intimate relationships are the primary means by which enduring social bonds are brought into being. A family or household group is the first building block of society and these blocks need a firm legal cornerstone. If not they may be crushed by the weight of title-holders who see ownership as vesting the right to unfettered discretion free from relational obligations. South African family law gives needy dependents rights to claim from relatives. Nevertheless, as noted in the *Volks* case: "Unfortunate the reality is that maintenance claims in a poverty situation are unlikely to alleviate vulnerability in any meaningful way".⁶²¹ The individual titling system used for subsidized housing results in rights of disposal for the holders, meaning the right to dispose of housing shelter. Entrenching poor dependents' private right to shelter (in a subsidized house) as a support or maintenance right alone, is to put the cart before the horse. Dependents sheltering in the "cart" are far from secure if the "horse" is free to ride away carrying only the beneficiaries who hold title to the stranded "cart." Ownership titles are easily exchanged for large sums of cash. This

⁶²¹ *Volks NO vs Robinson* 2005 5 BCLR 446 (CC) para 66.

freedom to “unhitch” is unlikely to build stable family life, particularly in a context where poverty puts added strain on household loyalties. The model therefore designs a tenure right that is secured as a direct charge against the land that offers shelter, but has as its cause relational rights.

It must not be forgotten that urban poverty exacerbates struggles over scarce land and housing resources within the family as well as against outsiders. Prenuptial agreements currently represent the only private relational contract with the full spread of legal mechanisms necessary to achieve total housing security between a household *inter se*. This is due to their privileged position of being the only contract in which an irrevocable succession agreement is possible. Prenuptial contracts are unable to secure tenure for all poor dependents, due to them being focused on marriage alone. Nevertheless the arguments for prenuptial contracts hold true for any type of cohabitation agreement in all respects except succession. This points to the need for unmarried cohabitants (and households where there is no intimate partner) to be given an equal statutory right to enter into a succession agreement to protect their dependents.

The tenure debate must be taken into the private realm of household power imbalances that occur in the absence of a direct charge against land that protects the vulnerable. There is no statute creating an automatic charge against land in favour of legal dependents. There is only the common law that creates automatic community of property for spouses. In practice therefore the remaining option is the facilitation of the freedom to *contractually* create a charge against land immediately upon marriage, within a broad constitutional frame. This thesis, based as it is on pragmatic premises, takes existing law capable of immediate application to promote this result.

8.4 CONSTITUTIONAL NORMS AND RELATIONAL TENURE

The thesis has traversed three sets of relationships relevant to housing. The first is the State-beneficiary relationship that binds the State to an obligation to promote access to housing as far as reasonably possible. The second is the beneficiary-

dependent relationship that binds beneficiaries to an obligation to house their dependents. The third is the husband-wife relationship that binds spouses to an obligation to house each other.

The Constitutional Court has not as yet given a judgment outlining a constitutional approach to the private horizontal rights of dependents in subsidized housing. In the seminal *Grootboom* case the housing measures implemented by the State for children and their caregivers are considered. Its principles are highly relevant to their relational rights in the private sphere. It held that access to adequate housing that excludes “a significant segment of society could not be said to be reasonable” as the Constitution requires that “everyone be treated with care and concern,” such that measures that fail to respond to “the needs of those most desperate... might not pass the test”.⁶²² The high figures showing occupants that differ from original beneficiaries in housing developments (as discussed in the tenure chapter) is indicative of the likely extensive loss of housing by dependents. As the *Grootboom* case notes “shelter is not a commodity separate from housing”.⁶²³ It can legitimately be asked whether vulnerable dependent’s housing should constitute a commodity at all in the context of subsidized housing. Subsidized housing measures that fail to secure dependents’ tenure against deprivation by their caregivers do not pass the test of reasonableness according to these constitutional norms.

The Constitutional Court has also not as yet given a judgment outlining a constitutional approach to spouses’ equal rights to differing matrimonial property regimes. In the *Van der Merwe* case, which dealt with claims between spouses in delict, Moseneke J refuses to be drawn into a discussion on the relative merits of various marital property regimes in the light of the Constitution.⁶²⁴ This thesis has argued that marriage results in obligatory community of property for the poor that can result in an arbitrary deprivation of land and housing tenure security for dependents. This is so if marriage secures ownership and control of an undivided

⁶²² *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) 1172.

⁶²³ Para 73.

⁶²⁴ *Van der Merwe v Road Accident Fund* 2006 6 BCLR 682 (CC). Moseneke J is also the judge who, in the *Gumede* case, decided to replace “official Zulu” matrimonial property law with community of property for all monogamous customary marriages, unless excluded by a prenuptial agreement.

half share for a new spouse (or the whole house on the intestate death of the other spouse) who then has no legal duty to support step-children or in-laws, or to support unrelated financial dependents who are members of the household.

The subsidized housing programmes in South Africa under the new democratic dispensation have attempted to create first class ownership rights on a par with the rights of other landowners. The absence of access to the right to individualised matrimonial property regimes creates a second-class set of land tenure rights based on marriage. Following section 25 and 26 of the Constitution the State must take reasonable measures to foster conditions which enable citizens to gain access to land and housing on an equitable basis. Providing access to attorneys and notaries to assist the poor to contract out of the default community of property as suggested in the thesis could foster equal access to subsidized land and housing for dependents.

Once the right to access legal assistance to contract out of the default community of property is accepted, the constitutional issue narrows to public policy issues surrounding unfettered private contractual discretion over the alienation of State-subsidized land that supports housing tenure for needy dependents. Abuse of dependents' rights is by no means an issue only experienced by the poor. Lawyers and family mediators regularly deal with disputes amongst the affluent – to their complete and absolute shame – over maintenance for children and arrangements for the matrimonial home. The fact that affluence does not cure this human frailty warns of the greater need of the poor (who cannot easily access legal assistance) for protection that is a charge against the land. However, facilitating access to individualised marital property regimes for use with subsidized housing in the absence of restrictions protecting dependents, is clearly not desirable. It is also probably unconstitutional as against the public morals and not in the public interest.

8.5 PRO-POOR PRENUPTIAL AGREEMENT DISADVANTAGES

There are foreseeable disadvantages to the use of prenuptial contracts to secure housing tenure. Firstly it is uncertain whether the target group would wish to use them and whether they would use them responsibly. In this researcher's view that

low-literacy on the part of the contracting parties and lack of capacity in government departments to facilitate such agreements would be the greatest hurdle to overcome. In addition the recognized problem of the inability of beneficiaries to afford municipal services and taxes, thereby creating liability for municipalities, may be exacerbated.⁶²⁵ There are also problems surrounding expenses that would be incurred due to current Deeds Office processes that would require the prenuptial agreement to be lodged separately as a deed of servitude, prior to endorsement against an existing title deed. In addition there would be challenges surrounding the education required to ensure informed consent on the part of both parties. Similarly the preference for informal norms may result in resistance to prenuptial agreements as a process of formal regularisation. Also, as the Constitutional Court rightly points out in the *Bhe* case, when spouses come to an agreement about assets: “Having regard to the vulnerable position in which some of the surviving family members may find themselves, care must be taken that such agreements are genuine and not the result of the exploitation of the weaker members of the family by the strong”.⁶²⁶

8.6 PRO-POOR PRENUPTIAL AGREEMENT ADVANTAGES

The question must be asked whether it is beneficial to formalize the consequences of personal relationships, whether by contract or by statute. As Chenwi and McKlean note, “the link between subsidy and family structure may not be sufficiently flexible to deal with fluid household formation,” which may compel women to stay in abusive relationships they would otherwise leave.⁶²⁷ It should be noted however that the rules of family law and ownership already determine the legal consequences of cohabitation, marriage and parenting, irrespective of the economic context. This means it is the *nature* of those consequences that is the issue at stake. The fluidity of household formation amongst the poor affects the acceptance of obligations for dependents by beneficiaries of subsidized housing. This makes it a much more

⁶²⁵ Department of Human Settlements “Part 2: The Policy Context” in *National Housing Code 1* (2009) 18.

⁶²⁶ *Bhe v Magistrate, Khayelitsha* 2005 1 BCLR 1 (CC) para 130. The comment is made in the context of two customary wives entering into an agreement over the property of their deceased husband.

⁶²⁷ L Chenwi & K McLean “‘A Womans’ Home is Her Castle?’ – Poor Women and Housing Inadequacy in South Africa in B Goldblatt & K McLean (eds) *Women’s Social and Economic Rights: Developments in South Africa* (2011) 128 142.

central tenure problem than is generally recognized. More titles to subsidized housing are being given to women to deal with the tide of single mothers carrying the full burden of childcare. This is not enough. The facilitation of a process whereby couples are given a framework within which to reflect on their relationship and future obligations seems a highly necessary step.

The relevance of committing to apply as co-beneficiaries for a subsidized house is underestimated. Co-ownership of a housing asset in the context of poverty is as binding in its personal consequences as any marriage. In fact – for the destitute poor – a cohabiting partner is likely to be easier to leave than a house. Commitment to co-ownership needs to include a more fully realized commitment to each other and to dependents. As the quotation at the beginning of this chapter states: “Families must be strengthened by interventions that will enable kinship networks to maintain and improve support to vulnerable family members”. Pro-poor prenuptial agreements are such an intervention.

This thesis has shown that housing tenure can be secured for both spouses and dependents if couples marry with a prenuptial agreement structured in a pro-poor manner, using existing law. This is primarily achieved by means of the personal servitude registered as a real right limiting the ownership of dependents’ caregivers. The retention of private ownership rather than State-controlled rental tenure is desirable. The State does not have the capacity to manage and maintain large quantities of properties on behalf of beneficiaries. Secondly, legal certainty regarding the ownership of subsidized property can be extended through the use of succession agreements. Couples who prefer to leave succession open for future flexibility need not use the succession clause. In such instances either the intestate estate or the provisions of a will would still be subject to the overarching housing right. Thirdly, further private control by the household can be enhanced, by consenting to alternative dispute resolution mechanisms capable of free use with mediators and arbitrators of their choice.

The housing right entrenched in the model designed is not tradable and is therefore secured by de-commodification. Continued ownership is equally secured, not only by the agreed terms of the contract, but also by the housing right which would act as

a break on speculative sales. This means the housing rights of aging spouses (after the housing need of financial dependents is overcome) is protected, as well as their capacity to secure tenure for their descendants when they pass away. It also removes from the State a considerable portion of the onerous responsibility of facilitating access to justice to determine the outcome of private household disputes. The Housing Code states that one of its strategies to create sustainable human settlements is the removal of barriers to housing trade in the subsidized-housing secondary market.⁶²⁸ Individual subsidies are therefore made available to qualifying households to purchase existing improved residential properties. The model template does not preclude sales, recognizing that families must retain their freedom of mobility. It merely limits the ease with which they can occur. It must also be borne in mind that household problems are a constant that carry over from primary markets to secondary markets, raising the need for prenuptial agreements in the secondary pro-poor market as well.

The prenuptial agreements' emphasis on housing use rights mirrors other legal attempts to secure the tenure of occupants against eviction in both rural and urban areas. This extremely broad range of potentially positive uses raises the question whether domestic contracts should be brought within the land tenure security debate. If so, State funding for and facilitation of such contracts is a necessity. The interviews with housing officials resulted in a largely positive response to the functionality of such agreements. Some officials suggested that municipal community participation forums and the housing consumer education programme could be used to act as a catalyst for broad community discussion, to overcome the problem of lack of knowledge. It was also suggested that funding for such agreements be channelled either through the housing subsidy system – which already funds the legal transfer costs – or through the budget for housing consumer education.

The Housing Code aims to build capacity in the institutional housing sector, as well as building the capacity of communities to “ensure they can constructively engage in

⁶²⁸ Department of Human Settlements “Policy Context” in *National Housing Code 1* (2009) 22.

all aspects of their development”.⁶²⁹ It also provides for the appointment of community development workers to strengthen the people’s contract through communities and community-based organisations and to “create awareness, provide consumer education and provide after hours support to communities”.⁶³⁰ These provisions are in keeping with the housing officials’ view that funding for such domestic agreements could be brought within the housing frame. Department of Justice funding also seems appropriate, in view of the clear legal nature of many of the housing problems that could be pre-empted by such agreements. A combination of State legal aid and *pro bono* work by the legal profession could be called for. The arguments for State savings (discussed in chapter 5), as well as norms of good governance, indicate the need for the State to facilitate assistance in this regard.

8.7 ASSESSING THE USE OF NARRATIVE STRATEGIES

Three fictional life stories have been used in the thesis to distil and humanize the issues. Three sets of re-storied real-life stories have been used to simulate clients to test the model template. Both the fictional and the re-storied real-life stories constructed by the researcher are largely factually orientated, with little eloquence. To balance this lack of poetic communicative eloquence, brief reference was made to two of the best-known literary narratives on marriage, *Pride and Prejudice* and the *Book of Ruth*. If viewed from a literary perspective, both texts would be seen as falling within the genre of a comedy of manners, a genre focussed specifically on analysing social norms and interactions. They will be returned to in closing, as the complex issues aired in their seemingly simple narratives of family life transcend what theoretical research can ever hope to convey.

Jane Austen’s *Pride and Prejudice* challenges both the notion of matrimonial property as a commodity, and the romanticism that naively believes love will conquer all. It is not without reason that Austen’s novel has endured as one of the

⁶²⁹ 28 and 30.

⁶³⁰ 33.

greatest works of literature. The novel satirizes both “upper” class pride (that sees character as determined by social class) and prejudice (the rejection of a member of the “upper” class without attempting to know their individual worth). In Austen’s day the issues addressed covered dowry territory. In the 21st century her work is a reminder that the universal human issues she tackles still need addressing in the area of prenuptial agreements.

For the reader focussed on tenure, the double marriage of Austen’s “happy ending” is premature. The tale is awash with family who behave badly or irresponsibly (and oust family from their houses) but there is no indication that the two joyous couples make any attempt to secure rights against the future consequences of family who may lack character. For the reader with a land tenure lens, a happy ending is when a couple can proactively fetter the future discretion not to protect vulnerable household members, while at the same time securing the land itself. Sadly – even within affluent households and family groups – it is often not enough to rely on people’s character alone for justice.

Couples who marry do not have the benefit of being able to read their own life story backwards, from the perspective of future generations, long after the date of their death. The simulated clients in chapter 7 made use of re-storied real-life stories, before working backwards to show what the effect would have been had prenuptial agreements been used. A final application of the same technique will now be used for the *Book of Ruth* narrative, as described in the methodology chapter. This re-storying process will ask what the outcome would have been if Ruth and Boaz (recognized as of equally noble character) had been given access to a pro-poor prenuptial agreement.

If a pro-poor prenuptial agreement had been available to the couple, they could have created a legally defensible charge against the land, to secure the rights of future vulnerable dependents (against kinsmen unwilling to take up their obligations). In other words they need not have left protection of tenure to the uncertain character of their descendants. Both Boaz and Ruth’s own ascent to land tenure security was

based on initially precarious relational ties.⁶³¹ A prenuptial agreement would have given them the freedom to circumvent equivalent uncertainty for future dependents. Ruth and Boaz could have formalized their personal ethics of prioritizing the needs of vulnerable dependents, by agreeing the manner in which poverty should strengthen, rather than weaken, relationally based land rights.

Words from the poem *Ruth*, by the social activist poet, Thomas Hood, are quoted to summarize the key issues raised in this thesis. He depicts Boaz as an affluent landowner entering into marriage (with the poor and landless Ruth), as follows:

*Sure, I said, heaven did not mean,
Where I reap thou shouldst' but glean,
Lay thou sheaf adown and come,
Share my harvest and my home.*⁶³²

The decision to issue individual title to applicants for subsidized housing was never intended to create a situation where individuals alone had the right to “reap” the benefits of ownership. Financial dependents need more than the right to “glean” what is left over, if there is anything left to glean. A prenuptial agreement can move beyond the conventional securing of rights for spouses alone. A pro-poor approach is not only something that can be done on behalf of the poor as a class. It is also an approach the individual poor can appropriate for themselves. Prenuptial contracts allow for a conscious contractual decision to prioritize the needs of a household’s vulnerable members.

8.8 FORMALITY, INFORMALITY AND REGULARISATION

As discussed in the tenure chapter, those who work with the urban poor soon recognise that informal systems are often used to secure tenure, rather than formal systems. Common examples include: the use of the original title deed document itself as proof of the land being traded (rather than a formal sale agreement and transfer of ownership being registered); the pledging of credit cards and identity

⁶³¹ As explained previously, Boaz’ mother had been a prostitute and Ruth’s marriage to her first husband was not necessarily recognized. See ch 2 43.

⁶³² T Hood 1799-1845 *The Complete Poetical Works of Thomas Hood* by Thomas Hood (1906).

documents as security for debts; proof of rates payment being seen as proof of entitlement to occupy; family evictions following different channels to legally established rules; or a letter of authority to act for an estate being used as proof of land ownership without formal transfer. The poor often informally adjust formal processes to secure tenure. If tenure is to be secured at grassroots, a pro-poor prenuptial agreement must first and foremost be able to be applied and recognized within this informal context. Access to formal justice cannot be the bar it must reach before any enforcement is possible.

The aim of this thesis is to test prenuptial agreements to secure tenure, not necessarily to regularize tenure, although this could result. As such the template attempts to stand in the gap between both the formal legal context and the informal social context. For the best result the processes developed would need to be informally appropriated in a participatory way. Communities would need to move forward the discussion about when and how dependents rights should be secured within a household. Identifying whether a woman is a wife or a mistress, or in a polygynous marriage, or involved only in a casual sexual encounter, is a very tense issue. The effect this has on all dependent children must become part of the urban housing tenure debate. Broader domestic housing agreements would need to evolve if tenure is to be secured within all these differing scenarios.

Regularization by means of formal registered prenuptial agreements may prove to be idealistic, or only something that can be achieved incrementally over a very long period of time. The first manifestation of the informal success of the pro-poor prenuptial concept would probably be the spontaneous emergence of simple affidavits speaking into the acceptance of obligations. If they followed the pattern of informal sales such affidavits would only partially record a much wider agreement, with the bulk of it remaining a verbal arrangement. Community recognition of the contents of both the written and the verbal components would evolve in its own way. The widespread use of formal prenuptial agreements reflecting constitutional principles is a long-term hope. Normative education regarding the use of formal contracts can be used strategically to act as the catalyst for more structured *informal* processes of household rights determination, securing tenure in this way. Based on

the research, recommendations on policy development and future research are made below.

8.9 POLICY DEVELOPMENT AND FUTURE RESEARCH

8.9.1 PRO-POOR PRENUPTIAL AGREEMENT PILOT PROJECT

Before broad legal aid could be considered a pilot project should be run in a specific community to test community and individual acceptance of prenuptial agreements as a domestic cohabitation construct. It would need to commence with meetings with community leaders and the public, and a programme of education on the matters that can be contractually agreed between couples. It should unfold in three stages; the first on housing use, the second succession of ownership on death and the third alternative dispute resolution. Thereafter the model template should be developed (in a participatory manner) to the point where it can be registered according to the individual instructions of a sample of ten couples from the community, with the support of their peers. The standard template should then be reassessed for the extent to which it is capable of meeting a variety of personal needs. A costing of the process should be undertaken as well, distinguishing between the education stage and the consultation and registration stage. Should a standard template prove economically and socially viable, future research would then be necessary to test equivalent terms for standard templates for other domestic contracts. Equality concerns would require that similar constructs be made available for people in customary marriages, civil unions, intimate cohabiting relationships and non-intimate cohabiting relationships.

8.9.2 STATUTORY REFORM

A call for legal aid begs the question whether legislative intervention is necessary as the cheaper option. Should a clear need for private domestic contracts be shown, research should be undertaken on the long-term efficacy of statutory reform. A statutory housing right for dependents could potentially be created. Another statutory standard contract for subsidized housing, in addition to the existing statutory accrual provisions, could also be developed. The efficacy of streamlining

Deeds Office and notarial processes relevant to such contracts could be researched. Similarly a statutory provision could remove the common law requirement that housing dependents (as third parties) must accept prenuptial benefits in their favour. The need for legal aid to change matrimonial property regimes for people in existing marriages in community of property could be assessed. Alternately, legal aid to institute family land-holding trusts may achieve the same result. Reform of the intestate laws of succession by means of legislation, for financial dependents in subsidized housing, could also be studied.

8.9.3 RELATIONAL LAND INFORMATION SYSTEMS

Further research could also usefully be undertaken on the housing data system as an existing example of a social land tenure information system that records dependency relationships. The tenure efficacy of a land information system that records (in a public database) the intricate web of relationships that bind people and their dependents could be tested. An intensive study of a manageable sample of houses from a particular development (preferably showing a discrepancy between existing occupants and the original State beneficiaries) would be worthwhile. The objective would be to trace whether the tenure of both existing occupants and earlier occupants is based on any relational system of belonging or housing reciprocity.

The identity of all occupants would need to be recorded, as well as that of the beneficiaries and dependents listed in the housing database, with tracing agents used to find missing people. Women in customary unions or marriages and cohabiting partners would need to be included, as well as their dependents. Home Affairs records should then be used to identify relatives in the patrilineal, matrilineal and married lines. The identity numbers should then be used to run Deeds Office and housing database searches to check for ownership of land or receipt of housing subsidies. This could then be followed by interviews for verbal confirmation of housing arrangements for each person.

Thereafter a relational map could be drawn showing the pattern within which housing obligations are met, or refused, along relational lines. The impact of the

acceptance or refusal of relational obligations on security of housing tenure could then be analysed. It could then be assessed whether – for purposes of housing tenure security – there is a need for certain relational obligations to be made a public record, both for private and public use. Identifying if households are constructed according to financial or economic lines, rather than relational lines, would also be of value. Notably some of the questionnaires used to determine households in the informal settlement upgrading process (which must distinguish between an original shack dweller and a back yard dweller) ask which people “cook from one pot.”⁶³³ This is indicative of household construction according to economic, rather than familial, ties. This will be highly relevant to the recent housing policy decision for the upgrading of informal settlements, in terms of which households will be required to relocate together with the back yard dwellers that are renting from them. This will essentially create an artificial household without the usual relational bonds, and the long-term impact of this is best assessed now.

8.9.4 DEEDS SEARCHES AND ENDORSEMENT PROCESSES

Further research on the impact on rights arising out of Deeds Office endorsement and electronic search processes would be worthwhile.

8.9.5 PRO-POOR FAMILY TRUSTS

As stated earlier, the concept of a pro-poor prenuptial agreement is unknown and there are no standard templates available. Based on the conventional view of prenuptial agreements it is likely to be seen as a contradiction in terms. A pro-poor family trust template (as opposed to a generic charitable trust) is equally unknown, but offers similar legal opportunities. The succession agreement in the prenuptial agreement template briefly touches on trusts. The most developed pro-poor prenuptial agreement would be one that incorporates a *mortis causa* trust that does not terminate at the end of the life of a limited class of people. In other words a trust that endures for as long as there are financial dependents of an extended class of people, including unrelated household members. Further research on such a model as a pro-poor land tool would be worthwhile.

⁶³³ The researcher has been exposed to this in the context of informal settlement upgrading initiatives.

8.9.6 PRO-POOR ALTERNATIVE DISPUTE RESOLUTION

The template touches very briefly on free alternative dispute resolution processes for the poor to resolve small land and housing claims. This is a pressing need and merits further research.⁶³⁴

8.9.7 FURTHER NARRATIVE LEGAL RESEARCH

The experimental use of fictitious life stories, re-storying and literary narratives conceptualized in this thesis could be developed in future research. The strategy of using stories to test a legal theory that could (by virtue of its experimental nature) be dangerous to real people has been shown to be fruitful. Future community engagement on prenuptial issues could also use such narratives to initiate discussion. Similarly, different stories could serve as “case studies” to test functional types of social tenure worthy of inclusion in a social tenure domain model, or to test other experimental legal research. This approach comes with the major benefit of freeing the researcher from the ethics obligations that severely limit real-life case studies involving marginalized people.

8.10 CONCLUSION

Pride and Prejudice opens with the line: “It is a truth universally acknowledged, that a single man in possession of a good fortune must be in want of a wife”.⁶³⁵ In the opening chapter this thesis states that its simple aim is to test the hypothesis whether it can be said to be a universal truth that:

A poor single person in possession of a subsidized house, who is in want of a spouse, is equally in need of a pro-poor prenuptial agreement.

In conclusion it must be admitted that the hypothesis in favour of a pro-poor prenuptial agreement has not been proven to the point that it would be universally acknowledged as a necessity. It is submitted however that it has been shown that the poor in possession of a subsidized house are in equal need of prenuptial contracts as

⁶³⁴ See L Downie “Urban Pro-poor Registrations: Complex-Simple the Overstrand Project” (2011) 14 *PER* 119 in which the issues are discussed.

⁶³⁵ 1 n1 of this thesis.

the affluent. Other countries look to the Netherlands for ideas for prenuptial agreements, due to their default universal community of property system. South Africa inhabits the same legal space, but is unique in the large number of poor land owners to whom the community regime applies. The country must step forward into the prenuptial agreement debate, particularly for developing countries.

The poor deserve to be given the opportunity to express their own informal relational wisdom about land and housing. Pro-poor prenuptial agreements developed by the poor themselves could potentially show greater social sophistication than the conventional constructs. Assumptions should not be made in advance about the poor's capacity to contract wisely in such prenuptial agreements, without this ever having been tested. Notaries guide their clients, and when they give a client (rich or poor) a quick run through of possibilities, options that secure rights for vulnerable dependents should be amongst them. Attention should be drawn to the difference between a pro-prosperity prenuptial agreement and a pro-poor prenuptial agreement.

The pro-poor prenuptial agreement has shown itself fit for the purpose of aligning with the real world of financial dependents, as defined in the Housing Code. This makes it a pragmatic option. The joyous event of matrimony is an opportune time for couples to contract in advance to fetter discretion over land in favour of financial dependents. Agreements such as these are best reached before either blessings or sufferings have the power to bring about changes of heart. The pragmatic lawyer sees every character as open to flaws and every prenuptial contract as needing to manage this potentiality. The poor must also, of necessity, take a pragmatic view of the need to secure their housing tenure. Under current South African law this means they are indeed in equal need of a prenuptial tool to manage their exposure to relational risk and its impact on subsidized housing rights.

APPENDICES

Appendix A: List of Artworks

Battiss W <i>Figures In White Light</i> (mid 1960's).....	180
Bonhams auction catalogue 26-10-2011, courtesy of Bonhams, London	
<deleted pending copyright approval> (accessed 26-07-2015)	
Dyaloyi R <i>Enjoy Responsibly</i> (2013).....	1
Archive image courtesy of Everard Read Cape Town and the artist	
<deleted pending copyright approval> (accessed 27-07-2015)	
Kandinsky W <i>Complex-Simple</i> (1939).....	20
Image courtesy of the Centre Pompidou, Photo (C) MNAM-CCI, Dist.RMN-Grand Palais / Jacqueline Hyde	
<deleted pending copyright approval> (accessed 27-07-2015)	
Mtakatya X <i>Making Ends Meet</i> (201?)	217
Courtesy Cape Gallery, Cape Town	
<deleted pending copyright approval > (accessed 26-07-2015)	
Pemba GMM <i>Mother Feeding Her Child</i> (1980).....	48
Bonhams auction catalogue 23-03-2011, courtesy of Bonhams, London	
<deleted pending copyright approval> (accessed 27-07-2015)	
Pierneef JH <i>Chuniespoort</i> (1945).....	94
Bonhams auction catalogue 21-03-2012, courtesy of Bonhams, London	
<deleted pending copyright approval> (accessed 26-07-2015)	
Rodin A <i>The Kiss</i> (1889).....	66
Rodin insert (inside the deed diagram) archive image courtesy of the Rupert Museum, Stellenbosch	
Sekoto G <i>Jazz Band</i> (1965).....	137
Bonhams auction catalogue 17-10-2012, courtesy of Bonhams, London	
<deleted pending copyright approval> (accessed 26-07-2015)	

Appendix B: Land Rights Continuum

J Whittal “A New Conceptual Model for the Continuum of Land Rights”

(2014) 3 *South African Journal of Geomatics* 22.

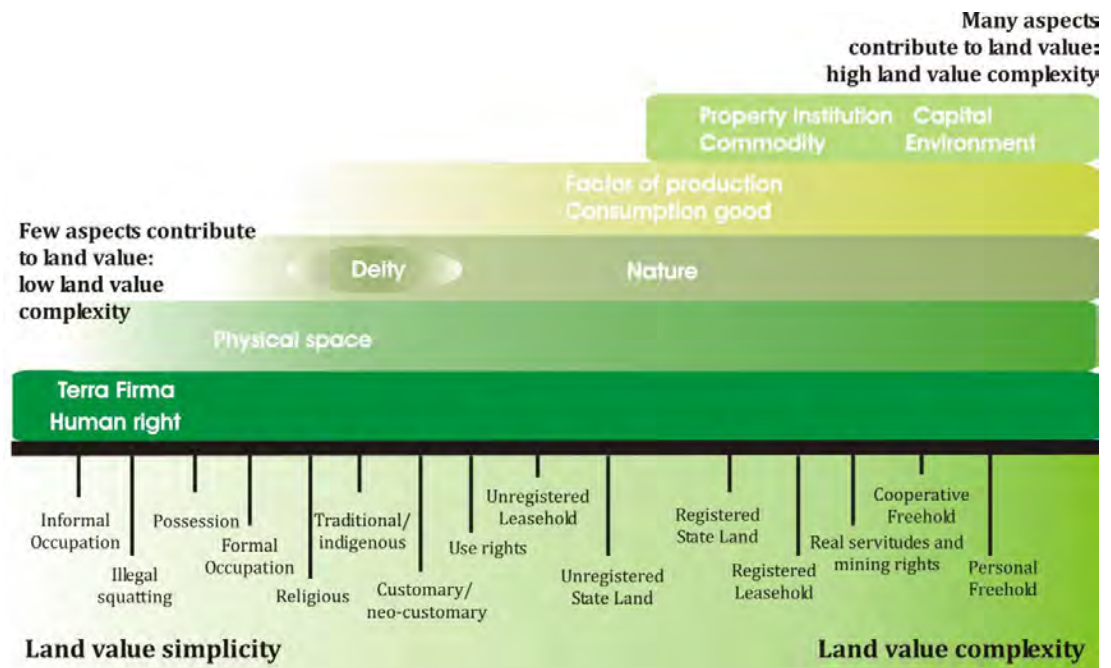


Figure 3: The correlation between land value complexity and land rights types

Appendix C: Checklist 1 Areas to Consider in Drafting a Life Partnership

Agreement

M Carnelley “Life Partnerships” in “Law of Persons and the Family” in *Lexis Nexis Forms and Precedents* updated 2009

- 1 Check whether you can advise. Check for potential conflict.
- 2 Provide for an equitable division of property.
- 3 Check whether common home is jointly or solely owned.
- 4 If the common home is co-owned, such co-ownership, including the proportion of the respective shares, must be portrayed in the title agreement. In the contract, reference can be made to the distribution.
- 5 In the case of sole ownership of the common home by one of the partners, the life partners might wish to expressly arrange reimbursement for the non owner for improvements done to the property at his or her expense.
- 6 If the common home is leased property, the contract should state the procedure with regard to evacuation of the property after termination of the relationship.
- 7 A procedure for the division of household goods should be included. A document listing private property owned at the inception of the relationship, or acquired during the relationship can be attached, thereby excluding such property from division.
- 8 Regulation of financial matters during the partnership.
- 9 Check whether clients have or intend to have children. Check whether one life partner is to support the other party during the relationship if such a partner is unemployed or staying home to care for small children born from the relationship.
- 10 Maintenance arrangements should be done expressly in the document. It is advisable that such maintenance should be rehabilitative in nature, and for a specified period giving such a person time to acquire marketable skills or become self supportive.
- 11 Check and advise as to provision for the following:
 - 11.1 personal property;
 - 11.2 gifts;
 - 11.3 credit agreements;
 - 11.4 ownership or provision of motor cars;
 - 11.5 debts: joint and several liability regulated as between the parties;
 - 11.6 provision of life insurance by parties for each other;
 - 11.7 pensions;
 - 11.8 provision of arrangements for living expenses;
 - 11.9 provision on death: execution of will (reference to such a will may be made in the contract, but the contract will not be regarded as a valid will if it does not comply with the formalities prescribed for a valid will);
 - 11.10 termination of agreed arrangements: on death, marriage of parties to each other, separation, agreement to terminate or vary (advise as to agreement of variation to reflect change in circumstances);
 - 11.11 transitional provisions: arrangements for joint finance and property on termination and separation.

Appendix D: Precedent 1 Antenuptial Contract with Accrual

MF Domingos in “Marriage and Settlement Contracts” in “Law of Persons and the Family” in *Lexis Nexis Forms and Precedents* updated 2009

Protocol No.

ANTENUPTIAL CONTRACT

BE IT HEREBY MADE KNOWN

THAT on this (day) day of (month) in the year of Our Lord One Thousand Nine Hundred and (year) (19) before me, (name of Notary), Notary Public, sworn and admitted according to law and residing and practising in (city and province), Republic of South Africa, and in the presence of the subscribing witnesses, personally appeared

(name of intended husband)

Identity Number (insert number)

Unmarried

and

(name of intended wife)

Identity Number (insert number)

Unmarried

AND the Appearers declared that whereas the said (name of intended husband) and (name of intended wife)

(hereinafter called “the parties”) intend to marry each other they have agreed that:

1 Notwithstanding anything to the contrary in any conflict of law rules contained and subject to the terms of this agreement the proprietary consequences of their intended marriage and the construction and interpretation of this agreement shall be governed by and regulated in accordance with the laws of the Republic of South Africa as at (date of signature of contract);

2 There shall be no community of property and no community of profit and loss between them in respect of their marriage;

3 Neither party shall be liable for any debt or obligation incurred by the other party before or during the subsistence of their intended marriage;

4 The accrual system referred to in Chapter 1 of the Matrimonial Property Act No. 88 of 1984 (“the Act”), but excluding any amendments thereof, shall apply to their intended marriage, in that:

4.1 On the dissolution of the marriage by divorce or by the death of either or both of the parties, the party whose estate shows no accrual or a smaller accrual than the estate of the other, or in the case of the death of the firstmentioned party, his or her executor, shall have a claim against the other party or his or her estate for an amount equal to one half of the difference between the accruals of the respective estates of the parties;

4.2 The abovementioned claim shall vest on the dissolution of the marriage and shall not during the subsistence of the marriage be transferable or liable to attachment or form part of the insolvent estate of either party;

4.3 The accrual of the estate of each party is the amount by which the net value of his or her estate at the dissolution of the marriage exceeds the net value of the estate at the commencement of the marriage;

4.4 Notwithstanding anything to the contrary herein contained, in determining the accrual of each party’s estate:

4.4.1 Any inheritances, legacies and donations which may accrue to either party during the subsistence of their marriage and all assets which either party may acquire by virtue of his or her possession or former possession of such inheritances, legacies or donations and income derived therefrom shall be excluded from the accrual of the estate of such party;

4.4.2 Donations by either party to the other, other than donations mortis causa, shall not be taken into account either as part of the estate of the donor or as part of the estate of the donee;

4.4.3 Any amount which shall have accrued to either party's estate by way of damages other than damages for patrimonial loss shall be left out of account;

4.4.4 The net value of the estate of each party at the commencement of their marriage shall be calculated with due allowance for any difference in the value of money which may exist at the commencement and the dissolution of their intended marriage and for this purpose the weighted average of the consumer price index as published from time to time in the Government Gazette of the Republic of South Africa or any index published in substitution therefor shall serve as prima facie proof of any change in the value of money;

4.4.5 The accrual of the estate of a deceased party is determined before effect is given to any testamentary disposals, donations mortis causa or succession pursuant to any laws of intestacy;

4.4.6 The parties agree not to make any donations, except donations which are reasonable gifts on festive occasions to family members, without the written consent of the other party and that the value as arithmetically adjusted of any donation made without the written consent of the other party shall be added to the net value of the estate of the party who made the donation, when calculating the net values of the estates of the respective parties on dissolution of the marriage;

4.4.7 Should either party be an unrehabilitated insolvent on the dissolution of the marriage, then the accrual system as set out above shall not apply and on the dissolution of the marriage each party shall be entitled to his or her own estate and effects only;

4.4.8 The parties declare the net value of their respective estates at the commencement of their intended marriage to be:

(name of intended husband) : (commencement value)

(name of intended wife) : (commencement value)

5 In determining the accrual of the Estate of the said (name of intended husband) the value of the following assets has been excluded from the commencement value and shall be excluded from the end value of the Estate of the said (name of intended husband);

(Specify)

Upon which conditions and stipulations the Appearer declared that the parties respectively promise and agree to solemnize their said intended marriage, mutually promising to allow to each other the full force and effect hereof under obligation of their persons and property according to law.

SIGNED at (place) on the day, month and year first aforewritten in the presence of the subscribing witnesses and of me, the Notary.

As witnesses:

1

(Signature of intended husband)

2

(Signatures of witnesses)

(Signature of intended wife)

QUOD ATTESTOR

NOTARY PUBLIC

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